Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

UNITED STATES OF AMERICA *EX REL.* GLENN A. HALL, MICHAEL A. MAPES AND FRED TRIBBLE,

Petitioners,

vs.

CREATIVE GAMES TECHNOLOGY, INC., et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Sections 201 and 81 of Title 25 United States Code create a cause of action to recover penalties and forfeitures in the form of money damages which may be brought on behalf of and for the benefit of the United States by *qui tam* relator-plaintiffs for certain violations of Title 25, including violations of Sections 81, 261-264 and 2701 *et seq.*, pertaining to the sale, leasing and operation of gambling devices to and/or on behalf of Indian tribes by commercial vendors and the provision of gambling management services to Indian tribes by commercial managers. Petitioners alleged that such arrangements with respect to gambling devices and gambling management services were made without the approval of the Department of the Interior as required by Sections 81 and 261-264. The United States District Court for the District of Minnesota dismissed these cases by reason of (1) lack of standing on the part of Petitioners and (2) failure to join certain Indian tribes as indispensable parties under Fed. R. Civ. P. 19(b). The United States Court of Appeals for the Eighth Circuit affirmed the District Court dismissals on the sole ground of failure to join indispensable parties.

The questions presented are:

QUESTIONS PRESENTED – Continued

1. Whether the District Court's hypothetical speculation that correct application of the law "might well signal the end of Indian gaming in the Upper Midwest"[1] justifies an abandonment of long-standing Congressional Indian affairs policy.

2. Whether the District Court and the Court of Appeals effectively repealed Acts of Congress through detracting from the clear purpose and scope of Title 25 U.S.C. §§ 81, 201, 261-264, and 2701 *et seq.*, in violation of the Powers clause underlying the doctrine of separation of powers and the Property Clause.

3. Whether or not this Court chooses to retain the full force of *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980). This case provides an important opportunity in the area of Indian affairs to define Congress' powers in the light of the unchecked expansion of gambling activities on Indian reservations throughout the United States.

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[1] Memorandum and Order of the District Court dated May 27, 1993 (App. 19).

LIST OF PARTIES

The parties to the proceedings below were the petitioners the United States *ex rel.* Glenn A. Hall, Michael A. Mapes and Fred Tribble.

The respondents before this Court include Creative Games Technology, Inc., a Minnesota corporation; Creative Games Technology, Inc., a Delaware corporation; Hanson Distributing, Inc., a Minnesota corporation; Indian Country Leasing Company, an Illinois corporation; Interstate Gaming Services, Inc., an Illinois corporation; Progressive Distribution Systems, Inc., a Minnesota corporation; Sodak Gaming Supplies, Inc., a South Dakota corporation; Tribal Gaming Supply, Inc., an Illinois corporation; Grand Casinos of Wisconsin, Inc. – Lac Courte Oreilles, a Minnesota corporation; Grand Casinos, Inc., a Minnesota corporation; Mille Lacs Gaming Corporation, a Minnesota corporation; Mille Lacs Partnership, a limited partnership; Hinkley Partnership, a limited partnership; John Doe Corporation; John Doe and Mary Roe, individuals; Allied Games, Inc., a Wisconsin corporation; Thomas N. Theisen, individually, d/b/a Theisen Vending; International Gaming Management, Inc., a Minnesota corporation; GMT Management Company, a Minnesota corporation; 1002 Distributing, Inc., an Illinois corporation, a/k/a Ten 'O Two Distributing, Inc.; and Tribal Gaming Supply, Inc., an Illinois corporation.

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To The United States Court Of Appeals
For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

The petitioners, the United States of America *ex rel.* Glenn A. Hall, Michael A. Mapes and Fred Tribble, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on July 5, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reproduced in the Appendix at page 1,[2] is reported at 27 F.3d 572. The memorandum decisions of the United States District Court for the District of Minnesota are found at App. 6 and 33. The group I opinion (May 27, 1993) is officially reported at 825 F.Supp 1422, the group II opinion (July 16, 1993) is not reported.

JURISDICTION

Invoking jurisdiction under 28 U.S.C. §§ 1331 and 1337, and 25 U.S.C. §§ 81, 201 and 2701 *et seq.*, the petitioners brought these cases in the United States District Court for the District of Minnesota. On May 27, 1993 and July 16, 1993 the District Court dismissed these cases by reason of (1) lack of standing on the part of petitioners and (2) failure to join certain Indian tribes as indispensable parties under Fed. R. Civ. P. 19(b).

On petitioners' appeal, the United States Court of Appeals for the Eighth Circuit on July 5, 1994, entered a judgment and opinion affirming the District Court's dismissals on the sole ground of failure to join indispensable parties as dispositive of the cases. A petition for rehearing was sought but denied on August 12, 1994. On November 2, 1994, Justice Thomas ordered that the time for filing this petition for writ of certiorari be extended to and including January 9, 1995.

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[2] Citations to Petitioner's Appendix will appear as "App. ___."

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes involved in the case are set forth in the appendix.

Article I, Section 8; Article III, Section 2; Article IV, Section 3, clause 2; United States Constitution:

> Article I, Sec. 8, Article III, Sec. 2, and Article IV, Sec. 3, cl. 2 provide the basis for the trust relationship between the United States and Indian tribes, the basis for the separation of power doctrine and the basis for Congress' authority over property of the United States. They are set forth at App. 101.

25 U.S.C. §§ 81, 201, 261-264, and 2701 et seq.:

> The provisions of 25 U.S.C. § 201 ("Section 201"), 25 U.S.C. § 81 ("Section 81"), 25 U.S.C. §§ 261-264 (the "Indian Traders Act") and 25 U.S.C. § 2701 *et seq.* (the "Indian Gaming Regulatory Act" or "IGRA"), provide the basis of the authority by which the standards under which the gambling related commerce with Indian tribes at issue in these cases are regulated, are set forth at App. 50.

STATEMENT OF THE CASE

The relator-petitioners are Indians who are members of the Lac Courte Oreilles Band of Chippewa Indians. In

1992 the relator-petitioners instituted these cases to recover penalties and forfeitures in the form of money damages on behalf of and for the benefit of the United States for certain violations of Title 25, namely, Sections 81, 261-264 and 2701 *et seq.*, pursuant to the *qui tam* standing provisions of Sections 201 and 81. The complaints alleged that certain respondents sold or leased gambling devices to certain Indian tribes for use on their respective reservations; certain respondents which owned gambling devices operated them on certain Indian reservations; and certain respondents provided gambling management services to certain Indian tribes. The complaints alleged that all such gambling related arrangements with respect to gambling devices and gambling management services were made without the approval of the Department of the Interior as required by Sections 81 and 261-264. The complaints further alleged that all of the respondents derived substantial amounts of money from their various gambling related activities the amounts of which, even if such activities would have been approved by the Department of the Interior, substantially exceeded the compensation guidelines promulgated by the Bureau of Indian Affairs ("BIA") of the Department of the Interior. Further, the complaints alleged that certain of the respondents engaged in gambling related activities on certain Indian reservations even before the enactment of IGRA which activities also clearly violated several of gambling related criminal statutes of the United States.

The details of alleged gambling related Title 25 violations have not been fully developed at the pretrial stage of these cases because of the dismissals by the District

Court. However, it was discovered that few of the gambling-related arrangements were reduced to formal writing despite the millions of dollars involved in the transactions. Moreover, the Office of the Inspector General, Department of the Interior, has undertaken investigation of the gambling activities conducted on certain of the Indian reservations which are the subject of these cases and the Department's findings and conclusions generally substantiate the allegations of the complaints herein. The Inspector General also concluded that as a result of failure to comply with the Title 25 law and gaming regulations, numerous transactions avoided the scrutiny intended by Congress and the various Indian tribes have lost hundreds of thousands or even millions of dollars of revenue.[3]

These cases find their origin in the relator-petitioners' involvement in tribal management of bingo operations on several Minnesota and Wisconsin Indian reservations. The relator-petitioners became familiar with the procedures and regulations promulgated by the BIA with respect to bingo operations on Indian reservations. They observed that upon enactment of IGRA numerous persons and entities approached the tribal leadership of Indian tribes with various propositions which appeared

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[3] Memorandum Survey Report from the Assistant Inspector General for Audits, Office of Inspector General, United States Department of Interior to the Assistant Secretary for Indian Affairs and the Chairman, National Indian Gaming Commission, concerning the final survey report on implementation of the Indian Gaming Regulatory Act, Report No. 93-I-349, December 1992, available from the office of the Inspector General, United States Department of Interior.

at variance with the newly-enacted IGRA and the interim procedures and regulations promulgated by the BIA with respect to gaming operations on Indian reservations.[4] The relator-petitioners investigated the Indian gambling related activities of the respective respondents and concluded that such respondents were violating the relevant provisions of Title 25 and the procedures and regulations promulgated by the BIA. Consequently, they instituted these cases under the *qui tam* relator authority of 25 U.S.C. §§ 201 and 81 to recover penalties and forfeitures in the form of money damages on behalf of and for the benefit of the United States.

Title 25, Sections 261-264, commonly referred to as the Indian Traders Act, requires the licensing of persons engaging in commerce with Indians or Indian tribes on their reservations which requirement has been a fundamental element of Congressional Indian affairs policy since 1790. The Indian Traders Act and related Section 201 derive, with very little change, from the very earliest Indian Trade and Intercourse Acts, beginning in 1790. The language of the first statutes makes it very clear, as pointed out by this Court in *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), that "the Federal Government has comprehensively regulated trade with the Indians to prevent 'fraud and imposition' upon them." *Id.* at 163. Thus, the Act of July 22, 1790, ch.

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[4] Relator-petitioners Hall and Mapes organized a company to provide gambling management services to Indian tribes in 1991. Subsequently, during 1992 the company was sold and Messrs. Hall and Mapes presently have no involvement in the gambling management service industry.

33, Section 3, 1 Stat. 137, reached anyone who attempted "to trade with the Indian tribes, *or* be found in the Indian country . . . ". *See generally*, F. PRUCHA, AMERICAN INDIAN POLICY IN THE FORMATIVE YEARS: THE INDIAN TRADE AND INTERCOURSE ACTS, 1790-1834 (1962). The primary purpose of Congressional Indian policy reflected in the Indian Traders Acts, then, as now, was to limit the risk that Indians would continue to become victims of fraud and imposition in commercial intercourse by controlling whosoever did substantial trade with Indians and Indian tribes. Whatever activities gave rise to such opportunities was subject to regulation. The Indian Traders Act may have been impractical to apply to isolated minor transactions with Indians and Indian tribes, but it has always clearly applied to continuous commercial dealings, dealings in specifically prohibited commodities, or dealings involving substantial transactions. *See, e.g.*, Act of June 30, 1834, ch. 161, Sections 7 and 20. It cannot be seriously argued that the Indian Traders Act was not intended to apply to transactions which involve commerce in otherwise prohibited gambling devices and *malum in prohibitum* gambling management activities, and involve substantial amounts of money ranging from hundreds of thousands to millions of dollars.

The Section 201 *qui tam* enforcement provision has its origin in the original Congressional legislation of the

Ordinance of August 7, 1786[5] as carried forward to this day in 25 U.S.C. § 201.[6] Section 201 provides that any

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[5] The Ordinance of August 7, 1786 states in pertinent part:

[A]ll fines and forfeitures, which may be incurred by contravening this ordinance, shall be sued for, and recovered before any court of record within the United States, the one moiety thereof to the use of him or them who may prosecute therefor, and the other moiety to the use of the United States.

[6] *Qui tam* provisions are found in all of the Indian Traders' Acts enacted by Congress. The Intercourse Act of July 22, 1790, provides in pertinent part:

Section III

> That every person who shall attempt to trade with the Indian tribes, or be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license first had and obtained, as in this act prescribed, and being thereof convicted in any court proper to try the same, shall forfeit all the merchandise so offered for sale to the Indian tribes, or so found in the Indian country, which forfeiture shall be one-half to the benefit of the person prosecuting, and the other half to the benefit of the United States.

The Intercourse Act of March 30, 1802, provides in pertinent part:

Section XVII

> [A]ll fines and forfeitures, which shall accrue under this act, shall be one-half to the use of the informant, and the other half to the use of the United States; except where the prosecution shall be first instituted on behalf of the United States; in which case the whole shall be to their use.

The Intercourse Act of June 30, 1834, provides in pertinent part:

Section XXVII

> [A]ll penalties which shall accrue under this Act, shall be sued for and recovered in an action of debt, in the name of the United States, before any court having

person may bring suit as a *qui tam*[7] relator on behalf of the United States to recover penalties, including fines and forfeitures, arising from certain violations of provisions of Title 25, including §§ 81, 264 and IGRA; additionally, § 81 contains a provision[8] authorizing any person to bring suit to recover monies received by a party pursuant to a commercial arrangement or transaction which does not meet the requirements of § 81.

Since 1872, § 81 has required the approval by the Secretary of the Interior and the Commissioner of Indian Affairs for certain contracts with Indian tribes. Section 81 was first enacted by Congress nearly a century after the Ordinance of August 7, 1786.[9] The Congressional history and policy underlying § 81 is to protect the Indians from improvident contracts. CONG. GLOBE, 41st Cong., 3d Sess. 1483-1487 (1871); *see also, In Re Sanborn*, 148 U.S. 222, 227 (1893). Section 81 represented a reaffirmation of the Congressional policy which had then already been in

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> jurisdiction of the same (in any state or territory in which the defendant shall be arrested or found), the one half to the use of the informer, and the other half to the use of the United States, in which case the who shall be to their use.

[7] *Qui tam* is the accepted abbreviation for the phrase *"qui tam pro domino regae quam pro sitso"* which translates to "he who is as much for the king as for himself."

[8] Statutes such as 25 U.S.C. §§ 201 and 81 are commonly referred to as *qui tam* enforcement statutes.

[9] 25 U.S.C. § 81 (1982), is derived from Revised Statutes § 2103, which was based on and carried forward from the Act of May 21, 1872, ch. 177, §§ 1, 2, 17 Stat. 136, which in turn was based on and carried forward from the Act of March 3, 1871, ch. 120, § 3, 16 Stat. 570.

effect for over 100 years as represented by the Indian Traders Act.

Sections 2701 *et seq.*, commonly referred to as IGRA, enacted in 1988 and implemented in 1993, augmented Congress' statutory scheme of regulation of Indian commerce through regulating gambling activities conducted by Indian tribes on their reservations. IGRA, in its turn, reaffirmed the Congressional Indian policy which by 1988, the year of IGRA's passage, had been in place and in continuous application for over 200 years. IGRA specifically addressed gambling related commerce in an attempt to enhance control of this burgeoning area of commercial activity so vulnerable to exploitation. While endeavoring to encourage Indian commerce for the purpose of developing tribal self-sufficiency, it clearly intended to do so without relaxing Congressional control of such commercial activity. Section 2702 of IGRA states the declared purpose of IGRA to be to:

> (1) Provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal government;
>
> (2) provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation . . .

The United States District Court for the District of Minnesota dismissed these cases by reason of (1) lack of standing on the part of Petitioners and (2) failure to join certain Indian tribes as indispensable parties under Fed. R. Civ. P. 19(b). The United States Court of Appeals for the Eighth Circuit affirmed the District Court dismissals

on the sole ground of failure to join indispensable parties as dispositive of the cases.

REASON FOR GRANTING THE WRIT

The Eighth Circuit's decision effectively repealed Acts of Congress through detracting from the clear purpose and scope of Title 25 U.S.C. §§ 81, 201, 261-264, and 2701 *et seq.*, in violation of the Powers clause underlying the doctrine of separation of powers and the Property Clause.

Without Congressional authorization, the Eighth Circuit has created a new Indian affairs policy in the United States. The Court of Appeals has given itself and the Eighth Circuit district courts the regulatory power over Indian commerce vested in Congress under the Constitution and otherwise delegated to the Department of the Interior by the Congress. Such a drastic reordering of the doctrine of separation of powers deserves the Court's review.

The Eighth Circuit's creation of a new Indian affairs policy directly conflicts with this Court's ruling in *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980). The Court of Appeals has grafted an indispensable party requirement onto a current Congressional Indian affairs policy. The Court of Appeals has, in effect, repealed the Congressional enforcement policy of Title 25. The Court of Appeals cannot, under the guise of indispensable party considerations, abridge the clear and plain scope and intent of §§ 201 and 81 which represent an exercise of Congressional power implementing Congressional Indian affairs policy of over 200 years. The

Court of Appeals has departed from the central mission of the Judiciary.[10] The Court of Appeals has engaged in what would otherwise be considered as *ultra vires* legislation through adding Indian tribes as a party in *qui tam* relator suits brought on behalf of and for the benefit of the United States despite the clear and plain language of the statutes.

Although separation of powers issues relating to the Judicial Branch do not often arise, it is clear that legislative functions which are the appropriate job of Congress cannot be abridged by action of the Judicial Branch.[11] Article III considerations are as much a limitation on Judicial Branch powers[12] as such considerations are limitations on Congressional powers.

The boundary lines between Congress and the Judicial Branch could not be clearer than in this case. The Constitution provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[13] This Court has expressed its concern against the danger of the Judicial Branch undertaking "tasks that are

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[10] As Justice Harlan wrote for the Court in *Field v. Clark*, 143 U.S. 649 (1892): "The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." *Id.*, at 693-694.

[11] *See Mistretta v. United States*, 488 U.S. 361 (1989).

[12] *Id.*, at 389 ("[T]he judicial power of the United States is limited by express provision of Article III to 'Cases' and 'Controversies' . . . . ")

[13] U.S. Const. Art. I, § 1.

more properly accomplished by [other] branches."[14] There is no acceptable delegation of legislative power to the Judicial Branch. In the instant case the Eighth Circuit simply engaged in legislative rulemaking, rather than applying the law.

Two aspects of the District Court's memorandum dismissing these cases by reason of its perceived indispensable party requirement require emphasis:

(1) The "sovereign immunity" of Indian tribes, which is the basis for the syllogistic argument that Federal Rule 19(b) requires or allows dismissal of these cases does not have any relevance to claims of the United States because Indian tribes are not immune from suit by the United States. *United States of America v. Red Lake Band*, 827 F.2d 380 (8th Cir. 1987), *cert. denied* (1988). Congress has absolute power with respect to Indian tribes, just as it does over United States property and territories, including Indian territories; it is that very power which gives rise to the trust obligation which Congress has assumed for itself as the foundation stone of its Indian policy from the time of the Northwest Ordinance to the present day. *See* Articles III and IV of the Northwest Ordinance (1787). The relevant Indian tribes are free to petition Congress for a re-examination of their legal status and determination of the trust policies that have been the basis of their relationship with the United States government for over 200 years. They have not done so. The relevant Indian tribes do not have the power to veto acts of Congress or Congressional policy. What they

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[14] *Morrison v. Olsen*, 487 U.S. 654, 680-681 (1988).

cannot do by direct action they cannot accomplish indirectly by declining to join in *qui tam* suits under § 201 or § 81. Nor can the Eighth Circuit alter the Indian tribes' dependant sovereignty to the status of sovereign nations.

(2) Rather than implementing the purpose of the Congressional Indian affairs policy adopted in §§ 81, 261-264 and IGRA, the District Court's indispensable party analysis incorrectly focused on a perceived hypothetical speculation of the effect on the Indian tribes caused through enforcement of the relevant laws against the alleged violators. There was no evidence offered that the respondents, or for that matter, any businessman would not do business with Indian tribes if such businessmen have to comply with the law.[15] The Court stated (App. 19):

> The plaintiffs essentially seek rescission of the contracts and disgorgement of money paid for goods and services pursuant to those contracts. The message such a judgment would send to outside vendors would be that transactions with Indian gaming enterprises are subject to cancellation at any time and without regard to whether the contracts were freely and fairly negotiated, the extent to which the parties have performed their duties under the contracts or the settled expectations and reliance of the parties. Very few merchants would be willing to transact business with Indian casinos under such risky conditions. This might well signal the end of Indian gaming in the Upper Midwest.

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[15] Such a notion flies in the face of the reality of modern business which is conducted within the context of local, state and federal laws, rules and regulations regulating virtually every aspect of commerce.

Arguably, this unfounded fact-finding was given great deference by the Eighth Circuit. The Court of Appeals stated (App. 4):

> For the reasons given in the able opinion of the District Court, we agree with that Court that the Indian tribes are indispensable in the sense that word is used in Rule 19. It is simply inconceivable to us that a suit claiming that a contract is invalid should be allowed to proceed in the absence of all parties to the contract.

Thus, the Eighth Circuit has substituted the wisdom of this Court expressed in *In Re Sanborn*, 148 U.S. 222 (1893), with the District Court's view that any businessman willing to do business with Indian tribes should be exempted from complying with the laws of the United States. The Congressional scope and intent of §§ 81, 201 and 261-264 is clear: the statutes are intended to apply to commercial activity such as that of the respondents; that activity is intended to be licensed, restricted and scrutinized; a strong incentive is intended to be provided to induce *qui tam* private attorneys general to undertake and prosecute litigation required to effectively restrict such commerce and force businessmen to comply with the provisions of the statutes; and the purpose of such restrictions is to protect Indians and Indian tribes from fraud, unfair dealing and improvident contracts.

The gist of the relator-petitioners' argument is that a court should not consider, as a policy matter, whether actions such as these §§ 201 and 81 cases actually prevent fraudulent agreements or instead prove vexatious to the very interests they are designed to serve. Such a policy matter may well be open to debate; but not in the judicial

forum. Moreover, relator-petitioners argue the Eighth Circuit's analysis with respect to indispensable party requirements in these cases is irrelevant to the exercise of Congressional legislative power under the Powers clause. This Court has viewed Title 25 as a special legislative enactment having deep roots in history and tradition. This Court has consistently taught that Congress has the power to create Indian affairs policy. More pointedly, referring to the Indian trader statutes in *Central Machinery Co.* this Court stated:

> As we held in *Warren Trading Post*, . . . , by enacting these statutes Congress 'has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject.' It may be that in light of modern conditions the State of Arizona should be allowed to tax transactions such as the one involved in this case. Until Congress repeals or amends the Indian trader statutes, however, we must give them 'a sweep as broad as [their] language,' . . . and interpret them in light of the intent of the Congress that enacted them, ...

448 U.S. at 165-166 (citations omitted).

Equally in conflict with the decision below is the Property Clause.[16] The Property Clause grants to Congress the power to dispose of and to regulate "the Territory or other Property belonging to the United States." *See generally Oklahoma v. Atchison, T. & S. F. Ry.*, 220 U.S. 277 (1911); *United States v. Kagama*, 118 U.S. 375 (1886); *United States v. Rogers*, 45 U.S. (4 How.) 572 (1846). It

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[16] U.S. Const. Art. IV, § 3.

confirms in Congress, that fundamental aspect of sovereignty – absolute control over territory – which defines the relationship between Indians and the United States. Indian lands are territories of the United States over which Congress exercises the plenary authority of a sovereign. The powers of Congress under the Property Clause either in the disposition of federal property or in the promulgation of rules and regulations deemed needful by Congress in respect of the territory or property of the United States, are "without limit." *United States v. State of California*, 332 U.S. 19 (1947); *United States v. City and County of San Francisco*, 310 U.S. 16 (1940). The breadth of the power, and its supremacy over other powers or restrictions upon powers contained in the Constitution, is expressly confirmed in the Property Clause itself, which provides that "nothing in this constitution shall be so construed as to prejudice any claims of the United States." If no other provision of the Constitution can stand against an exercise of Congressional power under the Property Clause, it follows that lesser rules, such as rules of court, must yield to an exercise of that power. *United States v. State of California*, 332 U.S. 19 (1947).

The Title 25 statutes at issue relate directly to and regulate activities occurring upon Indian lands which are territories of the United States. These statutes are "needful rules and regulations respecting the territory . . . belonging to the United States" as provided in the Property Clause and must be allowed the full scope of their application without constitutional or prudential limitation.

The causes of action created by §§ 201 and 81 are claims of the United States created by Congress under the

powers of the Property Clause which cannot be prejudiced by action of the Eighth Circuit. The maintenance of these causes of action through the provision of §§ 201 and 81 is a disposition of federal property beyond the power of the Eighth Circuit to review or limit. *See generally United States v. Steinmetz*, 763 F.Supp. 1293 (N.J. 1991) *aff'd*, 973 F.2d 212 (3d Cir. 1992) (illustrating Property Clause application to all personal as well as real property); *Nuclear Data, Inc. v. Atomic Energy Commission*, 364 F.Supp. 423 (1973) (illustrating Property Clause application to intangible as well as tangible personal property). The power of Congress to dispose of United States' property includes the power to decide when, if, and how to dispose of that property, and Congress may use this power to achieve public policies. *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979); *Camfield v. United States*, 167 U.S. 518 (1897).

The Eighth Circuit has thus created a confusing precedent. It is directly in conflict with this Court's ruling in *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980) and *United States v. State of California*, 332 U.S. 19 (1947). Plenary consideration of the matter by this court is essential.

CONCLUSION

For the reasons set forth above, this petition for certiorari should be granted.

January 6, 1995

Respectfully submitted,

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APPENDIX A
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 93-2903MN, 93-3089MN

No. 93-2903MN

United States of America, ex rel. Glenn A. Hall; Michael A. Mapes; and Fred Tribble,

Appellants,

v.

Creative Games Technology, Inc., a Minnesota corporation; Creative Games Technology, Inc., a Delaware corporation; Hanson Distributing, Inc., a Minnesota corporation; Indian Country Leasing Company, an Illinois corporation; Interstate Gaming Services, Inc., an Illinois corporation; Progressive Distribution Systems, Inc., a Minnesota corporation; Sodak Gaming Supplies, Inc., a South Dakota corporation; Tribal Gaming Supply, Inc., an Illinois

* On Appeal from the United States District Court for the District of Minnesota.

[NOT TO BE PUBLISHED.]

corporation; Grand Casinos of Wisconsin, Inc. – Lac Courte Oreilles, a Minnesota corporation; Grand Casinos, Inc., a Minnesota corporation; Mille Lacs Gaming Corporation; a Minnesota corporation; Mille Lacs Partnership, a limited partnership; Hinkley Partnership, a limited partnership; John Doe Corporation; and John Doe and Mary Roe, individuals,

Appellees.

No. 93-3089MN

United States of America, ex rel. Glenn A. Hall; Michael A. Mapes; and Fred Tribble,

Appellants,

v.

Allied Games, Inc., a Wisconsin corporation; Thomas N. Theisen, individually, doing business as Theisen Vending; International Gaming Management, Inc., a Minnesota corporation; GMT Management Company, a Minnesota corporation; 1002 Distributing, Inc., an Illinois corporation, also known as Ten '0 Two Distributing, Inc.; Tribal Gaming Supply, Inc., an Illinois corporation; John Doe Corporation; and John Doe and Mary Roe, individuals,

Appellees.

On Appeal from the United States District Court for the District of Minnesota.

Submitted: May 9, 1994

Filed: July 5, 1994

Before RICHARD S. ARNOLD, Chief Judge, LIVELY,* Senior Circuit Judge, and FAGG, Circuit Judge.

PER CURIAM.

This is an action under 25 U.S.C. § 81 and other related statutes seeking a declaration that certain contracts related to Indian gaming operations are void for failure to comply with the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21, and other statutes. The action is brought in the name of the United States, on the relation of various named parties. The relators are private citizens, and the defendants are various providers of goods and services to Indian tribes which are conducting gaming operations. The tribes are in Minnesota and Wisconsin. They have not been made parties to the case.

The District Court[1] dismissed the complaint, holding, among other things, that the case (or, as we should say, cases, for a number of actions were filed) must be dismissed for failure to join indispensable parties. In the view of the District Court, "the Indian tribes who are parties to the agreements and transactions at issue are necessary and indispensable parties who cannot be joined

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*The Hon. Pierce Lively, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

[1] The Hon. Paul A. Magnuson, United States District Judge for the District of Minnesota.

involuntarily." *In re United States of America ex rel. Glenn A. Hall, et al., Litigation,* Civil Nos. 3-92-792 et al., slip op. 11 (D. Minn. May 27, 1993). The tribes cannot be joined involuntarily because they are entitled to sovereign immunity, and there is no indication that the immunity would be waived. We agree with the District Court that the tribes are necessary parties within the meaning of Fed. R. Civ. P. 19(a)(2)(i). They are parties to the challenged contracts, and their interest in the validity of the contracts would be directly affected by a judgment declaring the contracts void and unlawful, which is the relief sought by the plaintiffs. Under Fed. R. Civ. P. 19(b), the question then becomes "whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." For the reasons given in the able opinion of the District Court, we agree with that Court that the Indian tribes are indispensable in the sense that word is used in Rule 19. It is simply inconceivable to us that a suit claiming that a contract is invalid should be allowed to proceed in the absence of all parties to the contract.

This ground – failure to join indispensable parties – is adequate to dispose of the entire case, and we affirm on that basis. It is thus not necessary for us to reach the issues of standing and of the merits that the parties have briefed. The judgment is affirmed, substantially for the

reasons given in that portion of the District Court's opinion that deals with Rule 19. See 8th Cir. R. 47(B).

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

IN RE: U.S.A. ex. rel. GLENN A. HALL, et. al. LITIGATION	Civil File Nos. 3-92-792; 3-92-793; 3-92-795; 3-92-796; 3-92-798; 3-92-799; 3-92-801; 3-92-802; 3-92-803; 3-92-804; 3-92-839; 4-92-1159; 4-92-1175; 4-92-1176; 4-92-1177; 4-92-1178; 4-92-1179; 4-92-1180; 4-92-1181; 4-92-1182; 4-92-1183; 4-92-1184; 4-92-1185; 4-92-1186; 4-92-1188; 4-92-1189; 4-92-1190; 4-92-1191; 4-92-1192; 4-92-1193; 4-92-1194; 4-92-1196; 4-92-1197; 4-92-1198; 4-92-1199; 4-92-1200; 4-92-1201; 4-92-1202; 4-92-1203; 4-92-1204; 4-92-1261

MEMORANDUM AND ORDER

BACKGROUND

Following the 1988 passage of the federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-21 (1988), Indian tribes in Minnesota, Wisconsin and throughout the nation began to operate casinos and other

Class II and Class III "gaming" establishments and operations authorized by the Act. *See* 25 U.S.C. § 2710 (defining various classes of gaming under IGRA). In the course of establishing and operating the tribal gaming enterprises, Indian tribes in Minnesota and Wisconsin transacted business and entered contracts with various outside merchants and vendors for provision of goods and services. Transactions included contracts for sale and rental of gaming machines and equipment, advertising and marketing, training and management services and other goods and services necessary for the operation of tribal gaming facilities.

A number of these tribal gaming operations have prospered, providing much-needed revenue for the tribes and their members. The tribes, apparently satisfied with the contracts and arrangements for provision of goods and services related to their gaming operations, have not sought to revise or challenge those transactions. However, several persons not party to the agreements now seek to challenge them, contending those agreements violate federal law. The "relator-plaintiffs," private citizens suing on behalf of the United States, filed 42 suits in this court against the vendors who provided goods and services to the tribes seeking to void various contracts and transactions entered by Indian tribes in Minnesota and Wisconsin. The relator-plaintiffs (hereinafter plaintiffs) contend that the contracts are void for failure to comply with federal government approval requirements and other statutory provisions of 25 U.S.C. § 81 (1988); the Indian Trader Licensing Act (ITLA), 25 U.S.C. §§ 201 & 261-64 (1988); and the IGRA, 25 U.S.C. §§ 2701-21 (1988).

The plaintiffs seek, *inter alia*, rescission of the contracts and transactions at issue in these suits and refund of all monies paid by Indian tribes to defendant merchants pursuant to such contracts. If plaintiffs were successful, one-half of the refunded monies would be returned to the Indian tribes while the other half would be paid directly to the plaintiffs, as a reward for their assistance in the enforcement of federal laws. *See* 25 U.S.C. § 81. Plaintiffs also seek payment of penalties and other compensation pursuant to applicable federal statutes. *See, e.g.*, 25 U.S.C. § 201. The plaintiffs allege they are members of the Lac Courte Oreilles Band of Indians, which is party to contracts involved in four of these lawsuits. They allege no direct connection with the contracting parties in any of the other suits.

These cases were consolidated for pre-trial consideration before this court. Plaintiffs now seek summary judgment in each of these cases. Several defendants also move for summary judgment, while others have filed motions to dismiss.

DISCUSSION

Motion to Dismiss Standard

For the purposes of the defendants' motions to dismiss, the court takes all facts alleged in the plaintiffs' complaints as true. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). Further, the court must construe the allegations in the complaints and reasonable inferences arising from the complaints favorably to the plaintiffs. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). A motion to dismiss will be granted only if "it

appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Id.* at 187; *see Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). The court applies those standards and analysis in the following discussion.

I. STANDING

In order to maintain an action in federal court, all plaintiffs must show they meet the standing requirements of Article III of the United States Constitution. This is a threshold question in every federal case, which determines whether a federal court has the power to hear the suit. *Warth v. Seldin,* 422 U.S. 490, 498 (1975). In order to establish standing, a plaintiff must make a three part showing: (1) plaintiff must have sustained an injury in fact, i.e. an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between that injury and the complained-of conduct; and (3) it must be likely – as opposed to merely speculative – that the injury can be redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 112 S. Ct. 2130, 2136 (1992) (citations omitted).

A. 25 U.S.C. § 81

The parties agree that Congress enacted 25 U.S.C. § 81 for the protection of American Indians and Indian tribes. *See United States ex. rel. Shakopee Mdewakanton Sioux Community v. Pan American Mgmt. Co.,* 616 F. Supp. 1200, 1208 (D. Minn. 1985) (statute was enacted "solely

for the protection and benefit of Indians"), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986). Plaintiffs have not alleged they are members of the class of people the law was intended to protect. Even more significantly, plaintiffs have alleged no actual or concrete injury to themselves or their interests. Therefore, they fail to satisfy the indispensable actual injury requirement for standing to bring suit in federal court. *See id.* at 1207-08.

The text of 25 U.S.C. § 81 does not contradict this conclusion. The statute provides, in pertinent part:

> All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

25 U.S.C. § 81. The statute does not expressly establish standing for third persons who claim no direct interest in the contract, agreement, goods or services at issue. The statue merely states that suit may be brought in the name of the United States and that the person who prevails in such a suit is entitled to half of the recovery. The statute is silent as to which individuals or entities other than the

United States may bring suit to enforce its provisions.[1] Absent compelling evidence of clear congressional intent, this court will not infer or "read into" a statute a provision which effectively waives the Article III "injury in fact" requirement – an indispensable condition of this court's power to hear disputes.[2] *See Lujan,* 112 S. Ct. at

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[1] If Congress had intended to confer standing to sue on any and all persons without regard to any other injury or standing requirement, it could have done so readily by inserting such language as "any person [or "any citizen"] may bring suit to enforce this section." Several "private attorneys general" and "citizen suit" provisions in federal statutes show that Congress knows how to confer standing on all citizens when it chooses to do so. *See, e.g.,* Federal Water Pollution Control Act, 33 U.S.C. § 1369(b). Congress did not explicitly create such broad standing here and this court refuses to do so by judicial legislation.

[2] Finding the present plaintiffs have no standing to sue under 25 U.S.C. § 81 is consistent with previous decisions of this court cited by plaintiffs because the parties and their interests distinguish those cases from the case at bar. *United States ex. rel. Shakopee Mdewakanton Sioux Community v. Pan American Mgmt. Co.,* 616 F. Supp. 1200 (D. Minn. 1985) primarily considered two consolidated cases. In the first case, a management company which was party to a casino management contract brought suit against the Secretary of the Interior challenging his disapproval of the contract. Despite the fact that the plaintiff was a party to the contract in question, the court expressed doubt about whether the plaintiff had standing to bring the suit. Because the plaintiff lost on other grounds, the court declined to decide the standing issue in the first of the two consolidated cases. *See id.* at 1207. In the second *Shakopee Mdewakanton Sioux* case, the other party to the management contracts, the Indian community, sued to have multiple management contracts declared void. In addition to having an interest in the validity of the contracts, the Indian community had an even stronger claim to standing because the statute under which it sued was enacted for the

2136 (injury in fact is element of three-part "irreducible constitutional minimum" for standing); *see also Middlesex Cty. Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1, 14-15 (1981) (absent clear evidence of congressional intent, courts should not ordinarily read additional remedies into statute which already provides remedies).[3]

In a similar case, the Eighth Circuit recently reached the same conclusion. A non-Indian plaintiff brought suit

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benefit of Indians, thus placing them squarely within the "zone of interest" of the statute. *See id.* at 1208.

In *United States ex. rel. Dale Childs v. Glenn Hall & Assocs.*, CV 3-91-663 (D. Minn. 1992), the relator-plaintiff sought to void a management contract between a management company and the Prairie Island Mdewakanton Sioux Community. Relator-plaintiff Childs was a *member* of the Prairie Island Community, whose interests were directly implicated by the Community's contract. The Community's failure to obtain the Secretary of Interior's approval of the management contract constituted an actual, concrete injury to the plaintiff, satisfying that prong of the standing test.

Plainly, the United States itself also has standing to sue to vindicate the rights of Indians under federal statutes. *See, e.g., Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 478 & n.13 (1976).

[3] Plaintiffs allege they are members of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians (LCO Band), whose contracts are the subject of four of these suits (File numbers 4-92-1179, 4-92-1192, 4-92-1204 and 4-92-1261). The plaintiffs allege no specific injury-in-fact in those cases. Because the court finds, *infra*, that those cases must be dismissed for failure to join an indispensable party, it need not decide whether membership in the LCO Band alone would be sufficient to confer standing on plaintiffs to challenge contracts and transactions entered by that Band.

pursuant to the same statute, seeking to contest a management contract between an Indian tribe and a management company. *Schmit v. International Finance Mgmt. Co.*, 980 F.2d 498 (8th Cir. 1992). Because the plaintiff alleged no injury and was not within the zone of interests protected by 25 U.S.C. § 81, the court held he had no standing to bring the action. *Id.*

B. 25 U.S.C. §§ 201, 261-64

The preceding standing analysis applies with equal force to the plaintiffs' claims under the Indian Trader Licensing Act (ITLA), 25 U.S.C. §§ 201 & 261-64. Initially, nothing in sections 261-64 discusses who may bring suit to enforce those provisions. Unlike 25 U.S.C. § 81, there is no language in sections 261-64 which could even arguably provide a basis for non-Indian private citizen or *qui tam* standing. Therefore, the plaintiffs' standing to bring an action pursuant to the ITLA could rest only on 25 U.S.C. § 201.

Congress enacted the "penalties" provision (currently codified at 25 U.S.C. § 201), through which plaintiffs seek standing to enforce the ITLA against the defendants, at the same time as the ITLA, in 1834. The statute provides:

> All penalties which shall accrue under this title shall be sued for and recovered in an action in the nature of an action of debt, in the name of the United States, before any court having jurisdiction of the same, in any State or Territory in which the defendant shall be arrested or found, the one half to the use of the informer and the

> other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

25 U.S.C. § 201.

Similar to section 81, this statute is silent regarding which persons other than the United States may bring suit. It simply states that an "informer" is entitled to one-half of the penalty resulting from a successful suit. For the reasons set forth above with respect to section 81, the court will not infer standing for any and all persons, regardless of injury. Because plaintiffs do not allege direct, "actual injury" to their own interests, they fail to satisfy the standing requirements of Article III of the Constitution. *See Lujan,* 112 S. Ct. at 2136.

C. Limited Recovery

Even if plaintiffs could establish standing to sue under 25 U.S.C. § 201, their potential recovery under that statute would be limited to half of any penalty imposed by the ITLA. Under the Act, a person who trades with an Indian without proper permission "shall forfeit all merchandise offered for sale . . . , *and shall moreover be liable to a penalty of $500.*" 25 U.S.C. § 264 (emphasis added). The application of the section under which plaintiffs seek recovery is confined to "*penalties* which shall accrue under this title." 25 U.S.C. § 201 (emphasis added). The plain language of the statute does not provide for any other recovery. Therefore, the court concludes that even a proper private plaintiff suing to enforce sections 264 through 201 would be entitled to recover only one-half of

the applicable penalty, i.e., $250. *See U.S. ex. rel. Hornell v. One 1976 Chev.*, 585 F.2d 978, 981 (10th Cir. 1978) (reviewing language of statute and legislative history and concluding § 264 forfeiture is not "penalty" and thus cannot be recovered by private litigant under 25 U.S.C. § 201).

D. Indian Gaming Regulatory Act

Plaintiffs also seek to recover civil penalties for alleged violations of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-21.[4] They cite no provision of the IGRA which might confer standing on private litigants to seek monetary relief. In its review of the detailed and comprehensive statute, the court finds no provision which would supply an arguable basis for non-member private litigant standing.[5]

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[4] Many of the complaints in these cases do not allege any IGRA violation or cause of action. Obviously, in the cases in which plaintiffs have not pleaded an IGRA claim, they cannot pursue such a claim without amending their complaint. This discussion thus applies only to those cases in which plaintiffs have properly pleaded (in a procedural sense) an IGRA claim.

[5] This court's recent decision finding that members of an Indian tribe had standing to bring an action for the narrow purpose of enforcing the approval requirements of the IGRA is inapposite. *See* Memorandum and Order, *Maxam, et. al. v. Lower Sioux Indian Community of Minn.*, CV 3-92-193 (D. Minn. March 11, 1993). The plaintiffs in that action were members of an Indian community who were seeking to force the community to comply with IGRA approval provisions enacted for the benefit of Indians. With the exceptions previously noted, the plaintiffs in the present actions are not members of the Indian tribes which executed the allegedly improper agreements and transactions, nor can they claim any direct interest in those

The plaintiffs argue that 25 U.S.C. § 201 provides standing for them to bring an action to enforce the civil penalty provisions of the IGRA. However, the ITLA and the IGRA are two completely separate statutes, with different structures, purposes, and histories. Neither the language nor the history of section 201 suggests it applies to the IGRA. The language of the statute refers to "penalties which shall accrue under this title." The "title" to which the 1834 statute refers is Title XVIII of the Revised Statutes, which was comprised of the former Revised Statutes §§ 2039 to 2157. Many of those statutes were subsequently repealed, all were recodified, and none includes any provision of the IGRA. Congress enacted the IGRA in 1988, 155 years after the enactment of section 201. To suggest that in 1834 Congress foresaw the IGRA and the development of Indian gaming in its modern form would strain credulity. The IGRA is a broad, comprehensive statute. If Congress had intended to grant the extraordinary sort of standing plaintiffs seek to assert through a distant section and chapter of the United States Code, it likely would have explicitly discussed such standing or made reference to section 201 within the comprehensive structure of the IGRA. Plaintiffs proffer no evidence, not even the slightest piece of legislative history, suggesting that Congress ever intended that section 201 would provide private citizen standing to bring

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transactions. Further, even in *Maxam*, the court did not hold that plaintiffs had standing to seek monetary relief or penalties such as the plaintiffs seek in these cases.

suit to enforce the penalty provisions of the IGRA. Plaintiffs' bare reliance on the language of an antiquated statute enacted to address different concerns is grossly inadequate to support this extraordinary and tenuous standing argument.

Because the plaintiffs have no standing to bring these actions, the court has no subject matter jurisdiction. It is well-established that federal courts are courts of limited jurisdiction. The Constitution prohibits this court from hearing suits outside its subject matter jurisdiction, regardless of the parties' positions with respect to the question or the procedural posture of the suits. Therefore, the court must dismiss all of these suits. Those cases which the parties have not moved to dismiss for lack of subject matter jurisdiction, the court dismisses *sua sponte*.

II. INDISPENSABLE PARTIES

The court also finds that these cases must be dismissed for inability to join an indispensable party. Even if the plaintiffs could establish standing to bring these actions, the court would dismiss them because the Indian tribes who are parties to the agreements and transactions at issue are necessary and indispensable parties who cannot be joined involuntarily. *See* Fed. R. Civ. P. 19.

One who is not a party to an action is "necessary" to the action under Rule 19 (a)(2)(i) if that person "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest." Because the

absent Indian tribes are parties to the challenged contracts, their interest in the validity of the contracts would be directly affected by the judgment the plaintiffs seek. Therefore, the Indian tribes are necessary parties under Rule 19(a)(2)(i). *See Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 893 (10th Cir. 1989).

However, the absent tribes cannot be involuntarily joined because they enjoy sovereign immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).[6] If a person who is necessary under Rule 19(a)(2) cannot be made a party, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Fed. R. Civ. P. 19(b).

The Rule sets out four factors a court should consider in deciding whether an absent person is indispensable. The first two of the four factors are particularly relevant here:

> to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; [and] the extent to which, by protective provisions in the judgment,

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[6] Despite the fact that many of the Indian tribes that are parties to the challenged transactions are aware of the pendency of these suits seeking to void the contracts – ostensibly to protect the Indians' interests – not one of those tribes has sought to join this action as a plaintiff. At the very least, this suggests that the tribes themselves have a different view of the merit and wisdom of the contracts and transactions at issue in this matter.

> by the shaping of relief, or other measures, the prejudice can be lessened or avoided.

Fed. R. Civ. P. 19(b). As discussed above, the absent tribes are parties to the challenged contracts and transactions. The goods and services provided pursuant to the agreements are essential to the operation of the commercial casinos owned by the tribes. A judgment avoiding those transactions certainly would be prejudicial to the interests of the casinos and their owners, the tribes.

In a larger sense, the precedent set by rescission of transactions freely entered by the tribes would likely be extremely prejudicial to the tribes' long term interest in Indian gaming and the revenue it provides. The plaintiffs essentially seek rescission of the contracts and disgorgement of money paid for goods and services rendered pursuant to those contracts. The message such a judgment would send to outside vendors would be that transactions with Indian gaming enterprises are subject to cancellation at any time and without regard to whether the contracts were freely and fairly negotiated, the extent to which the parties have performed their duties under the contracts or the settled expectations and reliance of the parties. Very few merchants would be willing to transact business with Indian casinos under such risky conditions. This might well signal the end of Indian gaming in the Upper Midwest. Regardless of whether such a judgment would otherwise constitute the correct application of the law, it would undeniably be prejudicial to the interests of the Indian tribes.

The court can discern no way it could craft relief to reduce the prejudice to the non-party Indian tribes. The

plaintiffs seek rescission of contracts and transactions. There is no middle ground – either the transactions violate statutory requirements and are void, requiring repayment of all value paid by the tribes, or they comply with the law and are valid. *See* 25 U.S.C. §§ 81, 264. The tribes are intimately involved in these transactions and it would be impossible to fashion protective provisions to insulate them from the prejudice an adverse judgment would inflict. Even if the court were to take the extraordinary step of creating an intermediate remedy not provided in the statutes, any partial rescission or monetary relief granted to the plaintiffs would substantially prejudice the interests of the tribes by disrupting their existing commercial relationships and jeopardizing future commercial transactions and relationships. Therefore, the second factor of the Rule 19(b) test also weighs in favor of dismissal.

A judgment for the plaintiffs rendered in the absence of the tribes would also encroach on tribal sovereignty. It is well-established that, subject to limited exceptions, tribes have the right to self-governance, unimpeded by federal authorities. *See Martinez*, 436 U.S. 49 (1978); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (noting strong congressional policy of promoting Indian self-government). Plaintiffs seek, *inter alia*, to force the defendants to return monies already paid to them by various Indian tribes in return for goods and services. In a similar though not identical case, the Eighth Circuit recently held that "any order purporting to affect money already disbursed would be an impermissible encroachment on tribal sovereignty." *Pembina Treaty Comm. v. Lujan*, 980 F.2d 543, 545 (8th Cir. 1992). In that case, the Eighth Circuit upheld the dismissal of a suit on the ground that

an affected Indian tribe was an indispensable party. *Id.* Recognizing the overriding importance of tribal sovereignty, the Court held the dismissal proper even though the trial court found the plaintiffs had no other recourse to press their claim. *Id.*

Potential prejudice to the interests of the non-party tribes and protection of tribal sovereignty are such strong considerations in the present case that they must outweigh the remaining factors enumerated in Rule 19(b). With respect to the fourth factor, it appears that the plaintiffs may have no other remedy if these cases are dismissed. However, as demonstrated in the preceding standing discussion, the interests of plaintiffs in this matter are tenuous and indirect. In contrast, the non-party Indian tribes' interest in the transactions which are the subject of these suits is direct, clear and strong. As the Ninth Circuit has stated, "No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Lomayaktewa v. Hathaway,* 520 F.2d 1324, 1325 (9th Cir. 1975), *cert. denied* 425 U.S. 903 (1976). Moreover, where a necessary party is immune from suit, there may be "very little room for balancing of other factors" because immunity may be considered a compelling interest. *Wichita & Affiliated Tribes of Oklahoma v. Hodel,* 788 F.2d 765, 777 n.13 (D.C. Cir. 1986); *see also Enterprise Mgmt.,* 883 F.2d at 894 (dismissing an action under section 81 because a tribe was an indispensable party). Therefore, these suits must be dismissed for failure to join indispensable parties.

III. CHANGE OF VENUE

The plaintiffs have moved to change the venue of several cases to the Federal District Court for the Western District of Wisconsin.[7] Initially, because the plaintiff chooses where to bring an action, concerns about the fairness and convenience of venue generally focus on the defendant, not the plaintiff. *See Leroy v. Great Western United Corp.*, 443 U.S. 173, 180-84 (1979). More significantly, in all but one of these cases, the court need not address the question of change of venue because it does not have subject matter jurisdiction. Because plaintiffs have no standing to bring those actions, the court does not have power to hear them and thus the question of proper venue does not arise.

In the remaining action, the plaintiffs have a colorable standing argument due to their alleged membership in the Lac Courte Oreilles Band. *See U.S.A. ex. rel. Glenn Hall v. Interstate Gaming Serv., Inc.*, Civil No. 4-92-1192 (D. Minn. Dec. 2, 1992). However, the court has previously determined that action should be dismissed for inability to join an indispensable party. *See* Fed. R. Civ. P. 19. Therefore, the change of venue motion in this case is denied as moot.

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[7] The civil case file numbers of those eight cases are 3-92-801, 3-92-804, 4-92-1159, 4-92-1180, 4-92-1192, 4-92-1194, 4-92-1196 and 4-92-1202. These eight defendants initially moved to dismiss this matter for lack of personal jurisdiction. Without explanation, the defendants withdrew their personal jurisdiction objections on the day of the hearing.

IV. LEASES AND CONTRACTS FOR GOODS

The court found above that these suits must be dismissed for lack of standing and failure to join indispensable parties. Although each of those grounds is independently sufficient to dismiss these cases, the court believes it appropriate to discuss a third alternative ground for judgment in favor of the defendants in several cases brought under 25 U.S.C. § 81. In those cases,[8] plaintiffs seek to void leases and contracts for the sale of goods and services for non-compliance with statutory requirements.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Unigroup v. O'Rourke Storage & Transfer Co.*, 980 F.2d 1217, 1219-20 (8th Cir. 1992). Unless the provisions of the contracts at issue are ambiguous, raising questions of fact, questions of the applicability of 25 U.S.C. § 81 to contracts between Indians and non-Indian contractors are questions of law,

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[8] Those cases, which constitute the majority of the cases considered today, can be classified according to their three defendants. Defendant Sodak Gaming Supplies, Inc. is the defendant in Minnesota federal District Court civil file numbers 3-92-792, 3-92-793, 3-92-796, 3-92-798, 3-92-803, 4-92-1179, 4-92-1181, 4-92-1182, 4-92-1183, 4-92-1184, 4-92-1185, 4-92-1186, 4-92-1188, 4-92-1191, 4-92-1193, 4-92-1197, 4-92-1199, 4-92-1200 and 4-92-1203. Creative Games Technology, Inc. is defendant in civil files 4-92-1175, 4-92-1176, 4-92-1177, and 4-92-1178. Hanson Distributing is defendant in cases 3-92-795, 3-92-799, 3-92-802, 4-92-1189, 4-92-1190, 4-92-1198 and 4-92-1201.

appropriate for resolution at summary judgment. *See Barona Group of the Capitan Grande Band of Mission Indians v. American Mgmt. & Amusement, Inc.*, 840 F.2d 1394, 1340-41 (9th Cir. 1987); *Wisconsin Winnebago Business Community v. Koberstein*, 762 F.2d 613, 619 (7th Cir. 1985). No party suggests that the provisions of the contracts are ambiguous or that there exist any other genuine issues of material fact. Therefore, these cases are ripe for resolution on the parties' summary judgment motions.

Section 81 applies to two types of agreements; contracts for "services" to Indians "relative to their lands," and contracts for services relative to claims for payments due under federal law or "in any way connected with or due from" the United States. 25 U.S.C. § 81 (1988). Agreements governed by section 81 are subject to five requirements, one of which is that the agreements be approved by the Secretary of the Interior and the Commissioner of Indian Affairs. An agreement that does not meet all five of these requirements "shall be null and void" and any money paid by Indians or Indian tribes "in excess of the amount approved" may be recovered in a suit brought under section 81. Half of the recovery in a section 81 action goes to the plaintiff.

Some of the contracts the plaintiffs challenge in these cases are for the sale or lease of gambling equipment or for other services short of managing a casino. In some cases these other services consist of delivering, installing, and maintaining equipment and training personnel to use it. In other cases, the defendants contracted to advertise and market casinos. None of the challenged contracts are for services related to claims, the second class of contracts which section 81 governs. Therefore, if section 81 applies

to any contract at issue in these actions, it is because the contract is "relative to [Indian] lands." The defendants contend that section 81 does not govern the non-management contracts because they are neither service contracts nor "relative to [Indian] lands." The plaintiffs respond that the contracts satisfy both requirements.

A. Scope of Section 81

The language of section 81 establishes unambiguously that it applies to service contracts but not to sales contracts. The provision never mentions goods or merchandise but repeatedly refers to "services." Moreover, it describes the contracts it applies to as agreements for "services . . . relative to [Indian] lands," and for "services . . . relative to . . . any claims" for money due under federal law or from the United States. This delineation of section 81's scope suggests that Congress was concerned about contracts for the representation of Indians' interests, not ordinary sales contracts. *See U.S. ex. rel. Shakopee Mdewakanton Sioux Community,* 616 F. Supp. 1200, 1217 (D. Minn. 1985) (legislative history of section 81 shows that "contractual relations with attorneys and claims agents were foremost on Congress' mind"), *appeal dismissed,* 789 F.2d 632 (8th Cir. 1986). Other evidence bolsters the conclusion that section 81 does not govern sales contracts. For example, at the time Congress enacted section 81, the ITLA had been in existence for over thirty years. The ITLA requires non-Indians who trade with Indians to obtain a federal license. That this mechanism for regulating sales between Indians and non-Indians was in place when Congress enacted section 81 suggests that the later statute was not directed at sales contracts.

The legislative history of section 81 also supports the interpretation that it does not apply to contracts for the sale of goods. It appears from the legislative history that Congress was concerned specifically about contracts for services such as representation of Indian interests before Congress and the pressing of Indians' claims. For example, in urging passage of the measure, a proponent stated that non-Indians had contracted with Indians to represent them before Congress for exorbitant fees, including large portions of congressional appropriations to Indians. *See* Cong. Globe, 41st Cong., 3d Sess. 1484, 1486 (Feb. 22, 1871) (comments of Mr. Wilson). Another proponent stated that "The object of this section is to protect the Indians and the Government both against . . . claim agents." *Id.* at 1484 (comments of Mr. Corbett). Yet another supporter argued that, in addition to being unfair, representation agreements were unnecessary because the Indian Commissioner, federal Indian agents, and the Indian Committees in Congress adequately represented the Indians' interests. *Id.* at 1487 (comments of Mr. Casserly).

Despite the clear wording of section 81, the prior enactment of the ITLA, and the legislative history, the plaintiffs contend that *Green v. Menominee Tribe*, 233 U.S. 558 (1914), precludes any distinction between sales and service contracts in applying section 81. The *Green* Court concluded that an agreement to supply Indians with logging equipment and supplies was "clearly within the text of" section 81, without explaining how the sale of goods constituted a service. *Id.* at 569. As the transaction in *Green* seems to have been a sale, *id.*, it appears that the Supreme Court once interpreted section 81 to apply to

sales contracts. However, as the Seventh Circuit has stated, this "quite ancient" decision does not adequately explain why the statute should apply to such contracts. *Wisconsin Winnebago Business Committee v. Koberstein*, 762 F.2d 613, 617 (7th Cir. 1985)[9]. Moreover, citing *Koberstein*, the Seventh Circuit recently held that an agreement to manufacture products on tribal trust lands was not governed by section 81. *Altheimer & Gray v. Sioux Manufacturing Corp.*, 983 F.2d 803, 812 (7th Cir. 1993). This Court is persuaded by the *Altheimer* court's reasons for disregarding the plaintiffs' proffered reading of *Green*. Therefore, the Court concludes that Congress did not intend that section 81 govern sales contracts.[10]

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[9] In addition, the parties, posture, and policy considerations in *Green* distinguish it from the case at bar. In *Green*, the plaintiff was a vendor who provided logging equipment and supplies and did not receive payment. The defendant was the Menominee Indian Tribe, which had made payment to an "Indian agent," who failed to forward the payment to the plaintiff. The concerns of the enacting Congress about parties taking unfair advantage of Indian tribes in representation before Congress and in some commercial transactions were clearly implicated in *Green* and the Indian tribe used the secretarial approval requirement as a shield against effectively being forced to pay twice for the same goods. In the present case, plaintiffs, who were not parties to the transactions, seek to use section 81 as a sword to skewer the defendant vendors. Further, as discussed earlier, if the plaintiffs were successful in wielding their section 81 sword, they would also wound non-party Indian tribes and their members, whom section 81 was designed to protect.

[10] Although it appears from the legislative history that the lease and other non-management service contracts in these cases also may not be the sort of contracts Congress intended section 81 to govern, the court need not address that issue. As the following discussion shows, regardless of whether those

B. "Relative to [Indian] Lands"

Because section 81 states that it applies to agreements for "services . . . relative to [Indian] lands," any contract within the scope of section 81 must be both a service contract and relative to Indian lands. The non-management contract defendants argue that their contracts are not "relative to [Indian] lands." No Eighth Circuit decision has defined this phrase. In *Altheimer*, however, the Seventh Circuit considered Seventh, Eighth, and Ninth Circuit bingo management contract decisions that held such contracts were relative to Indian lands under section 81. *Id.* at 810-11 (discussing *Barona Group of Capitan Grande Band of Mission Indians v. American Mgmt. & Amusement, Inc.*, 840 F.2d 1394 (9th Cir. 1987), *cert. dismissed*, 487 U.S. 1247 (1988); *A.K. Mgmt. Co. v. San Manuel Band of Mission Indians*, 789 F.2d 785 (9th Cir. 1986); *Wisconsin Winnebago Business Comm. v. Koberstein*, 762 F.2d 613 (7th Cir. 1985); *United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Mgmt. Co.*, 616 F. Supp. 1200 (D. Minn. 1985), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986)). The *Altheimer* court distilled from these cases four factors "important" to determining whether a management contract is relative to Indian lands. *Id.* This Court finds the *Altheimer* court's analysis persuasive and believes that consideration of these four factors is appropriate in management contract cases. The factors, none of which is a *sine qua non* to a finding of relation to Indian land, are: 1) whether the contract

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types of services and transactions might otherwise be within the statute, the contracts at issue in these cases are not "relative to [Indian] lands" and thus fall outside the ambit of section 81.

relates to the management of a facility on Indian lands; 2) if so, whether the non-Indian party has exclusive rights to operate the facility; 3) whether the Indians are forbidden from encumbering the property; and 4) whether the operation of the facility depends on the Indian tribe's status as a separate sovereign. *Id.*

The *Altheimer* factors may not pertain directly to the defendants' sales, lease, and non-management services contracts because these contracts are not management contracts. Nevertheless, application of the sound principles behind the *Altheimer* factors reveals that the defendant's non-management contracts are not "relative to [Indian] lands."

First, these contracts do not relate to the management of a facility on Indian lands. A mere sale or lease of equipment clearly is not management. Nor are delivering, installing, and servicing equipment. Training casino personnel to use equipment is somewhat more akin to a management activity, but it certainly does not constitute management of a facility. Finally, while marketing and advertising might be considered management activities, neither can be described as management of a *facility* on Indian land.

The *Altheimer* court's analysis under the first factor supports the conclusion that the defendants' contracts in the cases at bar do not relate to the management of a facility on tribal land. There, the court found that a contract for technical and engineering assistance, marketing, training management personnel, and consulting services regarding the operation of a manufacturing plant on tribal lands did not implicate this factor because "the

facility was already in existence, was part of the Tribe's ongoing business, and was wholly owned by the Tribe." *Altheimer*, 983 F.2d at 806, 811.

Second, the defendants' contracts give them no exclusive rights to or control over Indian lands. Although in some cases the defendants' lease contracts give them the right to replace less profitable gambling machines in order to increase profits, this is not a grant of exclusive rights or control over Indian lands because the tribes and their management companies retained much greater control over the casino facilities. Similarly, in the cases in which the defendants provide marketing and advertising, their contracts do not give them control over any facilities. *See Altheimer*, 983 F.2d at 811 (finding that the second factor did not apply because the Indian management corporation "would be heavily involved in the venture," even though it did not have unilateral power to set wages, salaries, or operational and administrative costs, and even though "it may be an understatement to characterize [the non-Indian corporation] as a consultant").

Third, the plaintiffs do not allege, nor does any evidence in the record suggest, that the contracts forbid the Indian tribes from encumbering any property.

The fourth factor is the only one that appears to lend the plaintiffs any support. The operation of gambling facilities, and therefore, in a sense, the provision of gambling supplies and related services, does indeed depend on the Indian tribes' status as separate sovereigns; absent this status state law would forbid the operation of the casinos. *See Altheimer*, 983 F.2d at 812 ("Unlike bingo, manufacturers of latex medical products need not seek

refuge from state civil laws by locating on a reservation."). This factor, however, is not germane to the non-management contracts in these cases; if it were, all hiring of non-Indian casino employees and even the provision of toilet paper to a casino on Indian lands, for example, would require section 81 approval. Such a requirement would place an enormous administrative burden on Indian tribes, non-Indian contractors, and the government agencies responsible for section 81 approval. As the legislative history of section 81 indicates, the 1871 Congress was not interested in requiring that such mundane transactions be federally approved. The court concludes that the defendants' sales, lease, and non-management services contracts are not relative to Indian lands and thus need not comply with the requirements of section 81. Therefore, even if plaintiffs could establish standing to bring this action and show that the Indian tribes were not indispensable parties, the defendants would be entitled to summary judgment in these actions brought under section 81.

CONCLUSION

Plaintiffs have failed to establish standing to bring these suits. Further, because the Indian tribes are indispensable parties that cannot be joined in these suits, these cases must be dismissed under Fed. R. Civ. P. 19. Finally, the defendants are entitled to summary judgment in the majority of these cases because 25 U.S.C. § 81 does not apply to the contracts at issue in those actions.

Several of the defendants move for sanctions against the plaintiffs and their counsel, pursuant to Fed. R. Civ. P.

11. After careful review, the court determines sanctions are not appropriate in this matter.

Accordingly, **IT IS HEREBY ORDERED THAT:**

All of these cases are DISMISSED for lack of standing and inability to join an indispensable party;

Defendants' motions for summary judgment in civil case file numbers 3-92-792, 3-92-793, 3-92-796, 3-92-798, 3-92-803, 4-92-1179, 4-92-1181, 4-92-1182, 4-92-1183, 4-92-1184, 4-92-1185, 4-92-1186, 4-92-1188, 4-92-1191, 4-92-1193, 4-92-1197, 4-92-1199, 4-92-1200, 4-92-1203, 4-92-1175, 4-92-1176, 4-92-1177, 4-92-1178, 3-92-795, 3-92-799, 3-92-802, 4-92-1189, 4-92-1190, 4-92-1198 and 4-92-1201 are GRANTED;

Defendants' motions for sanctions are DENIED; and

Because of the potential for confusion engendered by resolution of multiple-issue cross-motions on 41 separate cases, the court will delay entry of judgment and retain jurisdiction in this matter for 10 days from the date of this order, to allow any party to move to correct clerical mistakes, omissions or other inadvertent errors.

Dated: May 27, 1993.

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

IN RE: U.S.A. ex rel. GLENN A. HALL, et al. LITIGATION **GROUP II**[1]	Civil File Nos. 3-92-794, 3-92-797, 3-92-800, 3-93-120, 4-92-1187, 4-92-1205, 4-92-1248, 4-93-57, 4-93-58, 4-93-59, 4-93-200, 4-93-201, 4-93-202, 4-93-203, 4-93-204 and 4-93-370

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[1] The cases considered and dismissed in this order are those with the following captions and file numbers:

USA ex rel. Glenn A. Hall et al. v. Allied Games, Inc. et al.	Civ. 3-92-794
USA ex rel. Glenn A. Hall et al. v. Thomas N. Theisen	Civ. 3-92-797
USA ex rel. Glenn A. Hall et al. v. Thomas N. Theisen	Civ. 3-92-800
USA ex rel. Glenn A. Hall et al. v. 1002 Distributing et al.	Civ. 3-93-120
USA ex rel. Glenn A. Hall et al. v. Thomas N. Theisen	Civ. 4-92-1187
USA ex rel. Glenn A. Hall et al. v. International Gaming et al.	Civ. 4-92-1205
USA ex rel. Glenn A. Hall et al. v. GMT Management Co. et al.	Civ. 4-92-1248
USA ex rel. Glenn A. Hall et al. v. International Gaming et al.	Civ. 4-93-57
USA ex rel. Glenn A. Hall et al. v. International Gaming et al.	Civ. 4-93-58
USA ex rel. Glenn A. Hall et al. v. International Gaming et al.	Civ. 4-93-59

MEMORANDUM AND ORDER

For the following reasons, the court finds it has no jurisdiction over the subject matter of the above-numbered matters. Therefore, pursuant to the provisions of Fed. R. Civ. P. 12(h)(3), the court *sua sponte* dismisses these actions for lack of subject matter jurisdiction.

BACKGROUND

Following the 1988 passage of the federal Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-21 (1988), Indian tribes in Minnesota, Wisconsin and throughout the nation began to operate casinos and other Class II and Class III "gaming" establishments and operations authorized by the Act. *See* 25 U.S.C. § 2710 (defining various classes of gaming under IGRA). In the course of establishing and operating the tribal gaming enterprises, Indian tribes in Minnesota and Wisconsin transacted business and entered contracts with various outside merchants and vendors for provision of goods and services.

USA ex rel. Glenn A. Hall et al. v. 1002 Distributing et al.	Civ. 4-93-200
USA ex rel. Glenn A. Hall et al. v. 1002 Distributing et al.	Civ. 4-93-201
USA ex rel. Glenn A. Hall et al. v. 1002 Distributing et al.	Civ. 4-93-202
USA ex rel. Glenn A. Hall et al. v. 1002 Distributing et al.	Civ. 4-93-203
USA ex rel. Glenn A. Hall et al. v. 1002 Distributing et al.	Civ. 4-93-204
USA ex rel. Glenn A. Hall et al. v. Tribal Gaming Supply et al.	Civ. 4-93-370

Transactions included contracts for sale and rental of gaming machines and equipment, advertising and marketing, training and management services and other goods and services necessary for the operation of tribal gaming facilities.

A number of these tribal gaming operations have prospered, providing much-needed revenue for the tribes and their members. The tribes, apparently satisfied with the contracts and arrangements for provision of goods and services related to their gaming operations, have not sought to revise or challenge those transactions. However, several persons not party to the agreements now seek to challenge them, contending those agreements violate federal law. The "relator-plaintiffs," private citizens suing on behalf of the United States, filed approximately 60 suits in this court against the vendors who provided goods and services to the tribes seeking to void various contracts and transactions entered by Indian tribes in Minnesota and Wisconsin. The relator-plaintiffs (hereinafter plaintiffs) contend that the contracts are void for failure to comply with federal government approval requirements and other statutory provisions of 25 U.S.C. § 81 (1988); the Indian Trader Licensing Act (ITLA), 25 U.S.C. §§ 201 & 261-64 (1988); and the IGRA, 25 U.S.C. §§ 2701-21 (1988).

The plaintiffs seek, *inter alia*, rescission of the contracts and transactions at issue in these suits and refund of all monies paid by Indian tribes to defendant merchants pursuant to such contracts. If plaintiffs were successful, one-half of the refunded monies would be returned to the Indian tribes while the other half would be paid directly to the plaintiffs, as a reward for their

assistance in the enforcement of federal laws. *See* 25 U.S.C. § 81. Plaintiffs also seek payment of penalties and other compensation pursuant to applicable federal statutes. *See, e.g.*, 25 U.S.C. § 201. Plaintiffs allege no direct connection with the contracting parties in these suits.

These cases were consolidated for pre-trial consideration before this court. Today the court disposes of 16 of those cases on its own motion.

DISCUSSION

Motion to Dismiss Standard

In determining whether to dismiss a suit pursuant to Fed. R. Civ. P. 12, the court takes all facts alleged in the plaintiffs' complaints as true. *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990). Further, the court must construe the allegations in the complaints and reasonable inferences arising from the complaints favorably to the plaintiffs. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). Dismissal is appropriate only if "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." *Id.* at 187; *see Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court applies those standards and analysis in the following discussion.

I. STANDING

In order to maintain an action in federal court, all plaintiffs must show they meet the standing requirements of Article III of the United States Constitution. This is a threshold question in every federal case, which determines whether a federal court has the power to hear the

suit. *Warth v. Seldin*, 422 U.S. 490, 498 (1975). In order to establish standing, a plaintiff must make a three part showing: (1) plaintiff must have sustained an injury in fact, i.e. an invasion of a legally protected interest which is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) there must be a causal connection between that injury and the complained-of conduct; and (3) it must be likely – as opposed to merely speculative – that the injury can be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (citations omitted).

A. 25 U.S.C. § 81

The parties agree that Congress enacted 25 U.S.C. § 81 for the protection of American Indians and Indian tribes. *See United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan American Mgmt. Co.*, 616 F. Supp. 1200, 1208 (D. Minn. 1985) (statute was enacted "solely for the protection and benefit of Indians"), *appeal dismissed*, 789 F.2d 632 (8th Cir. 1986). Plaintiffs have not alleged they are members of the class of people the law was intended to protect. Even more significantly, plaintiffs have alleged no actual or concrete injury to themselves or their interests. Therefore, they fail to satisfy the indispensable actual injury requirement for standing to bring suit in federal court. *See id.* at 1207-08.

The text of 25 U.S.C. § 81 does not contradict this conclusion. The statute provides, in pertinent part:

> All contracts or agreements made in violation of this section shall be null and void, and all

> money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

25 U.S.C. § 81. The statute does not expressly establish standing for third persons who claim no direct interest in the contract, agreement, goods or services at issue. The statute merely states that suit may be brought in the name of the United States and that the person who prevails in such a suit is entitled to half of the recovery. The statute is silent as to which individuals or entities other than the United States may bring suit to enforce its provisions.[2] Absent compelling evidence of clear congressional intent, this court will not infer or "read into" a statute a provision which effectively waives the Article III "injury in fact" requirement – an indispensable condition of this

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[2] If Congress had intended to confer standing to sue on any and all persons without regard to any other injury or standing requirement, it could have done so readily by inserting such language as "any person [or "any citizen"] may bring suit to enforce this section." Several "private attorneys general" and "citizen suit" provisions in federal statutes show that Congress knows how to confer standing on all citizens when it chooses to do so. *See, e.g.*, Federal Water Pollution Control Act, 33 U.S.C. § 1369(b). Congress did not explicitly create such broad standing here and this court refused to do so by judicial legislation.

court's power to hear disputes. *See Lujan*, 112 S. Ct. at 2136 (injury in fact is element of three-part "irreducible constitutional minimum" for standing); *see also Middlesex Cty. Sewerage Auth. v. National Sea Clammers*, 453 U.S. 1, 14-15 (1981) (absent clear evidence of congressional intent, courts should not ordinarily read additional remedies into statute which already provides remedies).

In a similar case, the Eighth Circuit recently reached the same conclusion. A non-Indian plaintiff brought suit pursuant to the same statute, seeking to contest a management contract between an Indian tribe and a management company. *Schmit v. International Finance Mgmt. Co.*, 980 F.2d 498 (8th Cir. 1992). Because the plaintiff alleged no injury and was not within the zone of interest protected by 25 U.S.C. § 81, the court held he had no standing to bring the action. *Id.*

B. 25 U.S.C. §§ 201, 261-64

The preceding standing analysis applies with equal force to the plaintiffs' claims under the Indian Trader Licensing Act (ITLA), 25 U.S.C. §§ 201 & 261-64. Initially, nothing in sections 261-64 discusses who may bring suit to enforce those provisions. Unlike 25 U.S.C. § 81, there is no language in sections 261-64 which could even arguably provide a basis for non-Indian private citizen or *qui tam* standing. Therefore, the plaintiffs' standing to bring an action pursuant to the ITLA could rest only on 25 U.S.C. § 201.

Congress enacted the "penalities" provisions (currently codified at 25 U.S.C. § 201), through which plaintiffs seek standing to enforce the ITLA against the

defendants, at the same time as the ITLA, in 1834. The statute provides:

> All penalties which shall accrue under this title shall be sued for and recovered in an action in the nature of an action of debt, in the name of the United States, before any court having jurisdiction of the same, in any State or Territory in which the defendant shall be arrested or found, the one half to the use of the informer and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

25 U.S.C. § 201.

Similar to section 81, this statute is silent regarding which persons other than the United States may bring suit. It simply states that an "informer" is entitled to one-half of the penalty resulting from a successful suit. For the reasons set forth above with respect to section 81, the court will not infer standing for any and all persons, regardless of injury. Because plaintiffs do not allege direct, "actual injury" to their own interests, they fail to satisfy the standing requirements of Article III of the Constitution. *See Lujan*, 112 S. Ct. at 2136.

C. Limited Recovery

Even if plaintiffs could establish standing to sue under 25 U.S.C. § 201, their potential recovery under that statute would be limited to half of any penalty imposed by the ITLA. Under the Act, a person who trades with an Indian without proper permission "shall forfeit all merchandise offered for sale . . . , *and shall moreover be liable to*

a penalty of $500." 25 U.S.C. § 264 (emphasis added). The application of the section under which plaintiffs seek recovery is confined to "*penalties* which shall accrue under this title." 25 U.S.C. § 201 (emphasis added). The plain language of the statute does not provide for any other recovery. Therefore, the court concludes that even a proper private plaintiff suing to enforce sections 264 through 201 would be entitled to recover only one-half of the applicable penalty, i.e., $250. *See U.S. ex rel. Hornell v. One 1976 Chev.*, 585 F.2d 978, 981 (10th Cir. 1978) (reviewing language of statute and legislative history and concluding § 264 forfeiture is not "penalty" and thus cannot be recovered by private litigant under 25 U.S.C. § 201).

D. Indian Gaming Regulatory Act

Plaintiffs also seek to recover civil penalties for alleged violations of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. §§ 2701-21.[3] They cite no provision of the IGRA which might confer standing on private litigants to seek monetary relief. In its review of the detailed and comprehensive statute, the court finds no provision which would supply an arguable basis for non-member private litigant standing.

The plaintiffs argue that 25 U.S.C. § 201 provides standing for them to bring an action to enforce the civil

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[3] Many of the complaints in these cases do not allege any IGRA violation or cause of action. Obviously, in the cases in which plaintiffs have not pleaded an IGRA claim, they cannot pursue such a claim without amending their complaint. This discussion thus applies only to those cases in which plaintiffs have properly pleaded (in a procedural sense) an IGRA claim.

penalty provisions of the IGRA. However, the ITLA and the IGRA are two completely separate statutes, with different structures, purposes, and histories. Neither the language nor the history of section 201 suggests it applies to the IGRA. The language of the statute refers to "penalties which shall accrue under this title." The "title" to which the 1834 statute refers is Title XVIII of the Revised Statutes, which was comprised of the former Revised Statutes §§ 2039 to 2157. Many of those statutes were subsequently repealed, all were recodified, and none includes any provision of the IGRA. Congress enacted the IGRA in 1988, 155 years after the enactment of section 201. To suggest that in 1834 Congress foresaw the IGRA and the development of Indian gaming in its modern form would strain credulity. The IGRA is a broad, comprehensive statute. If Congress had intended to grant the extraordinary sort of standing plaintiffs seek to assert through a distant section and chapter of the United States Code, it likely would have explicitly discussed such standing or made reference to section 201 within the comprehensive structure of the IGRA. Plaintiffs proffer no evidence, not even the slightest piece of legislative history, suggesting that Congress ever intended that section 201 would provide private citizen standing to bring suit to enforce the penalty provisions of the IGRA. Plaintiffs' bare reliance on the language of an antiquated statute enacted to address different concerns is grossly inadequate to support this extraordinary and tenuous standing argument.

Because the plaintiffs have no standing to bring these actions, the court has no subject matter jurisdiction. Federal courts are courts of limited jurisdiction. The Constitution prohibits this court from hearing suits outside its subject matter jurisdiction, regardless of the parties' positions with respect to the question or the procedural posture of the suits. Therefore, the court must dismiss all of these suits.

II. INDISPENSABLE PARTIES

The court also finds that these cases must be dismissed for inability to join an indispensable party. Even if the plaintiffs could establish standing to bring these actions, the court would dismiss them because the Indian tribes who are parties to the agreements and transactions at issue are necessary and indispensable parties who cannot be joined involuntarily. *See* Fed. R. Civ. P. 19.

One who is not a party to an action is "necessary" to the action under Rule 19(a)(2)(i) if that person "claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest." Because the absent Indian tribes are parties to the challenged contracts, their interest in the validity of the contracts would be directly affected by the judgment the plaintiffs seek. Therefore, the Indian tribes are necessary parties under Rule 19(a)(2)(i). *See Enterprise Mgmt. Consultants, Inc. v. United States ex rel. Hodel*, 883 F.2d 890, 893 (10th Cir. 1989).

However, the absent tribes cannot be involuntarily joined because they enjoy sovereign immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978).[4] If a person who is necessary under Rule 19(a)(2) cannot be made a party, "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Fed. R. Civ. P. 19(b).

The Rule sets out four factors a court should consider in deciding whether an absent person is indispensable. The first two of the four factors are particularly relevant here:

> to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; [and] the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided.

Fed. R. Civ. P. 19(b). As discussed above, the absent tribes are parties to the challenged contracts and transactions. The goods and services provided pursuant to the agreements are essential to the operation of the commercial casinos owned by the tribes. A judgment avoiding those

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[4] Despite the fact that many of the Indian tribes that are parties to the challenged transactions are aware of the pendency of these suits seeking to void the contracts – ostensibly to protect the Indians' interests – not one of those tribes has sought to join this action as a plaintiff. At the very least, this suggests that the tribes themselves have a different view of the merit and wisdom of the contracts and transactions at issue in this matter.

transactions certainly would be prejudicial to the interests of the casinos and their owners, the tribes.

In a larger sense, the precedent set by rescission of transactions freely entered by the tribes would likely be extremely prejudicial to the tribes' long term interest in Indian gaming and the revenue it provides. The plaintiffs essentially seek rescission of the contracts and disgorgement of money paid for goods and services rendered pursuant to those contracts. The message such a judgment would send to outside vendors would be that transactions with Indian gaming enterprises are subject to cancellation at any time and without regard to whether the contracts were freely and fairly negotiated, the extent to which the parties have performed their duties under the contracts or the settled expectations and reliance of the parties. Very few merchants would be willing to transact business with Indian casinos under such risky conditions. This might well signal the end of Indian gaming in the Upper Midwest. Regardless of whether such a judgment would otherwise constitute the correct application of the law, it would undeniably be prejudicial to the interests of the Indian tribes.

The court can discern no way it could craft relief to reduce the prejudice to the non-party Indian tribes. The plaintiffs seek rescission of contracts and transactions. There is no middle ground – either the transactions violate statutory requirements and are void, requiring repayment of all value paid by the tribes, or they comply with the law and are valid. *See* 25 U.S.C. §§ 81, 264. The tribes are intimately involved in these transactions and it would be impossible to fashion protective provisions to insulate them from the prejudice an adverse judgment would

inflict. Even if the court were to take the extraordinary step of creating an intermediate remedy not provided in the statutes, any partial rescission or monetary relief granted to the plaintiffs would substantially prejudice the interests of the tribes by disrupting their existing commercial relationships and jeopardizing future commercial transactions and relationships. Therefore, the second factor of the Rule 19(b) test also weighs in favor of dismissal.

A judgment for the plaintiffs rendered in the absence of the tribes would also encroach on tribal sovereignty. It is well-established that, subject to limited exceptions, tribes have the right to self-governance, unimpeded by federal authorities. *See Martinez*, 436 U.S. 49 (1978); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (noting strong congressional policy of promoting Indian self-government). Plaintiffs seek, *inter alia*, to force the defendants to return monies already paid to them by various Indian tribes in return for goods and services. In a similar though not identical case, the Eighth Circuit recently held that "any order purporting to affect money already disbursed would be an impermissible encroachment on tribal sovereignty." *Pembina Treaty Comm. v. Lujan*, 980 F.2d 543, 545 (8th Cir. 1992). In that case, the Eighth Circuit upheld the dismissal of a suit on the ground that an affected Indian tribe was an indispensable party. *Id.* Recognizing the overriding importance of tribal sovereignty, the Court held the dismissal proper even though the trial court found the plaintiffs had no other recourse to press their claim. *Id.*

Potential prejudice to the interests of the non-party tribes and protection of tribal sovereignty are such strong

considerations in the present case that they must outweigh the remaining factors enumerated in Rule 19(b). With respect to the fourth factor, it appears that the plaintiffs may have no other remedy if these cases are dismissed. However, as demonstrated in the preceding standing discussion, the interests of plaintiffs in this matter are tenuous and indirect. In contrast, the non-party Indian tribes' interest in the transactions which are the subject of these suits is direct, clear and strong. As the Ninth Circuit has stated, "No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable." *Lomayaktewa v. Hathaway,* 520 F.2d 1324, 1325 (9th Cir. 1975), *cert. denied* 425 U.S. 903 (1976). Moreover, where a necessary party is immune from suit, there may be "very little room for balancing of other factors" because immunity may be considered a compelling interest. *Wichita & Affiliated Tribes of Oklahoma v. Hodel,* 788 F.2d 765, 777 n.13 (D.C. Cir. 1986); *see also Enterprise Mgmt.,* 883 F.2d at 894 (dismissing an action under section 81 because a tribe was an indispensable party). Therefore, these suits must be dismissed for failure to join indispensable parties.

Accordingly, **IT IS HEREBY ORDERED** THAT:

All of these cases (i.e. Civil file numbers 3-92-794, 3-92-797, 3-92-800, 3-93-120, 4-92-1187, 4-92-1205, 4-92-1248, 4-93-57, 4-93-58, 4-93-59, 4-93-200, 4-93-201, 4-93-202, 4-93-203, 4-93-204 and 4-93-370 are DISMISSED for lack of standing and inability to join an indispensable party.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: July 16, 1993.

/s/ Paul A. Magnuson
Paul A. Magnuson
United States District Court Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-2903MNST

United States of America, Appellants, vs. Creative Games Technology, Inc., et al., Appellees.	* * * * * * * * *	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 12, 1994

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

TITLE 25 – INDIANS

. . .

SUBCHAPTER II – CONTRACTS WITH INDIANS

§ 81. Contracts with Indian tribes or Indians

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed [sic] upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

(R.S. § 2103; Pub.L. 85-770, Aug. 27, 1958, 72 Stat. 927.)

. . .

§ 201. Penalties; how recovered

All penalties which shall accrue under this title shall be sued for and recovered in an action in the nature of an action of debt, in the name of the United States, before

any court having jurisdiction of the same, in any State or Territory in which the defendant shall be arrested or found, the one half to the use of the informer and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

(R.S. § 2124.)

. . .

SUBCHAPTER III – TRADERS WITH INDIANS

. . .

§ 261. Power to appoint traders with Indians

The Commissioner of Indian Affairs shall have the sole power and authority to appoint traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians.

(Aug. 15, 1876, c. 289, § 5, 19 Stat. 200.)

§ 262. Persons permitted to trade with Indians

Any person desiring to trade with the Indians on any Indian reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians.

(Mar. 3, 1901, c. 832, § 1, 31 Stat. 1066; Mar. 3, 1903, c. 994, § 10, 32 Stat. 1009.)

§ 263. Prohibition of trade by President

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any Indian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

(R.S. § 2132.)

§ 264. Trading without license; white persons as clerks

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of $500: *Provided,* That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the Five Civilized Tribes, residing in said Indian country, and belonging to the Union Agency therein: *And provided further,* That no white person shall be employed as a clerk by any Indian trader, except such as trade with said Five Civilized Tribes, unless first licensed so to do by

the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior.

(R.S. § 2133; July 31, 1882, c. 360, 22 Stat. 179.)

. . .

§ 2701. Congressional findings

The Congress finds that –

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires Secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

(Pub.L. 100-497, § 2, Oct. 17, 1988, 102 Stat. 2467.)

§ 2702. Congressional declaration of policy

The purpose of this chapter is –

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

(Pub.L. 100-497, § 3, Oct. 17, 1988, 102 Stat. 2467.)

§ 2703. Definitions

For purposes of this chapter –

(1) The term "Attorney General" means the Attorney General of the United States.

(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission.

(3) The term "Commission" means the National Indian Gaming Commission established pursuant to section 2704 of this title.

(4) The term "Indian lands" means –

(A) all lands within the limits of any Indian reservation; and

(B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which –

(A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and

(B) is recognized as possessing powers of self-government.

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means –

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that –

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only is [sic] such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include –

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or

the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term 'class II gaming' includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

(9) The term "net revenues" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term "Secretary" means the Secretary of the Interior.

(Pub.L. 100-497, § 4, Oct. 17, 1988, 102 Stat. 2467; Pub.L. 102-238, § 2(a), December 17, 1991, 105 Stat. 1908; Pub.L. 102-497, § 16, Oct. 24, 1992, 106 Stat. 3261.)

§ 2704. National Indian Gaming Commission

(a) Establishment

There is established within the Department of the Interior a Commission to be known as the National Indian Gaming Commission.

(b) Composition; investigation; term of office; removal

(1) The Commission shall be composed of three full-time members who shall be appointed as follows:

(A) a Chairman, who shall be appointed by the President with the advice and consent of the Senate; and

(B) two associate members who shall be appointed by the Secretary of the Interior.

(2)(A) The Attorney General shall conduct a background investigation on any person considered for appointment to the Commission.

(B) The Secretary shall publish in the Federal Register the name and other information the Secretary deems pertinent regarding a nominee for membership on the Commission and shall allow a period of not less than thirty days for receipt of public comment.

(3) Not more than two members of the Commission shall be of the same political party. At least two members of the Commission shall be enrolled members of any Indian tribe.

(4)(A) Except as provided in subparagraph (B), the term of office of the members of the Commission shall be three years.

(B) Of the initial members of the Commission –

(i) two members, including the Chairman, shall have a term of office of three years; and

(ii) one member shall have a term of office of one year.

(5) No individual shall be eligible for any appointment to, or to continue service on, the Commission, who –

(A) has been convicted of a felony or gaming offense;

(B) has any financial interest in, or management responsibility for, any gaming activity; or

(C) has a financial interest in, or management responsibility for, any management contract approved pursuant to section 2711 of this title.

(6) A Commissioner may only be removed from office before the expiration of the term of office of the member by the President (or, in the case of associate member, by the Secretary) for neglect of duty, or malfeasance in office, or for other good cause shown.

(c) Vacancies

Vacancies occurring on the Commission shall be filled in the same manner as the original appointment. A member may serve after the expiration of his term of office until his successor has been appointed, unless the member has been removed for cause under subsection (b)(6) of this section.

(d) Quorum

Two members of the Commission, at least one of which is the Chairman or Vice Chairman, shall constitute a quorum.

(e) Vice Chairman

The Commission shall select, by majority vote, one of the members of the Commission to serve as Vice Chairman. The Vice Chairman shall serve as Chairman during meetings of the Commission in the absence of the Chairman.

(f) Meetings

The Commission shall meet at the call of the Chairman or a majority of its members, but shall meet at least once every 4 months.

(g) Compensation

(1) The Chairman of the Commission shall be paid at a rate equal to that of level IV of the Executive Schedule under section 5315 of Title 5.

(2) The associate members of the Commission shall each be paid at a rate equal to that of level V of the Executive Schedule under section 5316 of Title 5.

(3) All members of the Commission shall be reimbursed in accordance with Title 5, for travel, subsistence, and other necessary expenses incurred by them in the performance of their duties.

(Pub.L. 100-497, § 5, Oct. 17, 1988, 102 Stat. 2469.)

§ 2705. Powers of the Chairman

(a) The Chairman, on behalf of the Commission, shall have power, subject to an appeal to the Commission, to –

(1) issue orders of temporary closure of gaming activities as provided in section 2713(b) of this title;

(2) levy and collect civil fines as provided in section 2713(a) of this title;

(3) approve tribal ordinances or resolutions regulating class II gaming and class III gaming as provided in section 2710 of this title; and

(4) approve management contracts for class II gaming and class III gaming as provided in sections 2710(d)(9) and 2711 of this title.

(b) The Chairman shall have such other powers as may be delegated by the Commission.

(Pub.L. 100-497, § 6, Oct. 17, 1988, 102 Stat. 2470.)

§ 2706. Powers of the Commission

(a) Budget approval; civil fines; fees; subpoenas; permanent orders

The Commission shall have the power, not subject to delegation –

(1) upon the recommendation of the Chairman, to approve the annual budget of the Commission as provided in section 2717 of this title;

(2) to adopt regulations for the assessment and collection of civil fines as provided in section 2713(a) of this title;

(3) by an affirmative vote of not less than 2 members, to establish the rate of fees as provided in section 2717 of this title;

(4) by an affirmative vote of not less than 2 members, to authorize the Chairman to issue subpoenas as provided in section 2715 of this title; and

(5) by an affirmative vote of not less than 2 members and after a full hearing, to make permanent a temporary order of the Chairman closing a gaming activity as provided in section 2713(b)(2) of this title.

(b) Monitoring; inspection of premises; investigations; access to records; mail; contracts; hearings; oaths; regulations

The Commission –

(1) shall monitor class II gaming conducted on Indian lands on a continuing basis;

(2) shall inspect and examine all premises located on Indian lands on which class II gaming is conducted;

(3) shall conduct or cause to be conducted such background investigations as may be necessary;

(4) may demand access to and inspect, examine, photocopy, and audit all papers, books, and records

respecting gross revenues of class II gaming conducted on Indian lands and any other matters necessary to carry out the duties of the Commission under this chapter;

(5) may use the United States mail in the same manner and under the same conditions as any department or agency of the United States;

(6) may procure supplies, services, and property by contract in accordance with applicable Federal laws and regulations;

(7) may enter into contracts with Federal, State, tribal and private entities for activities necessary to the discharge of the duties of the Commission and, to the extent feasible, contract the enforcement of the Commission's regulations with the Indian tribes;

(8) may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission deems appropriate;

(9) may administer oaths or affirmations to witnesses appearing before the Commission; and

(10) shall promulgate such regulations and guidelines as it deems appropriate to implement the provisions of this chapter.

(c) Report

The Commission shall submit a report with minority views, if any, to the Congress on December 31, 1989, and every two years thereafter. The report shall include information on –

(1) whether the associate commissioners should continue as full or part-time officials;

(2) funding, including income and expenses, of the Commission;

(3) recommendations for amendments to the chapter, and

(4) any other matter considered appropriate by the Commission.

(Pub.L. 100-497, § 7, Oct. 17, 1988, 102 Stat. 2470.)

§ 2707. Commission staffing

(a) General Counsel

The Chairman shall appoint a General Counsel to the Commission who shall be paid at the annual rate of basic pay payable for GS-18 of the General Schedule under section 5332 of Title 5.

(b) Staff

The Chairman shall appoint and supervise other staff of the Commission without regard to the provisions of Title 5, governing appointments in the competitive service. Such staff shall be paid without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, except that no individual so appointed may receive pay in excess of the annual rate of basic pay payable for GS-17 of the General Schedule under section 5332 of that title.

(c) Temporary services

The Chairman may procure temporary and intermittent services under section 3109(b) of Title 5, but at rates for individuals not to exceed the daily equivalent of the maximum annual rate of basic pay payable for GS-18 of the General Schedule.

(d) Federal agency personnel

Upon the request of the Chairman, the head of any Federal agency is authorized to detail any of the personnel of such agency to the Commission to assist the Commission in carrying out its duties under this chapter, unless otherwise prohibited by law.

(e) Administrative support services

The Secretary or Administrator of General Services shall provide to the Commission on a reimbursable basis such administrative support services as the Commission may request.

(Pub.L. 100-497, § 8, Oct. 17, 1988, 102 Stat. 2471.)

§ 2708. Commission – access to information

The Commission may secure from any department or agency of the United States information necessary to enable it to carry out this chapter. Upon the request of the Chairman, the head of such department or agency shall furnish such information to the Commission, unless otherwise prohibited by law.

(Pub.L. 100-497, § 9, Oct. 17, 1988, 102 Stat. 2472.)

§ 2709. Interim authority to regulate gaming

Notwithstanding any other provision of this chapter, the Secretary shall continue to exercise those authorities vested in the Secretary on the day before October 17, 1988, relating to supervision of Indian gaming until such time as the Commission is organized and prescribes regulations. The Secretary shall provide staff and support

assistance to facilitate an orderly transition to regulation of Indian gaming by the Commission.

(Pub.L. 100-497, § 10, Oct. 17, 1988, 102 Stat. 2472.)

§ 2710. Tribal gaming ordinances

(a) Exclusive jurisdiction of Class I gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of Class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if –

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II

gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that –

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than –

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which –

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes –

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if –

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and

(B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if –

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to

notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which –

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has –

(A) conducted its gaming activity in a manner which –

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for –

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation –

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706 (b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsec. (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are –

(A) authorized by an ordinance or resolution that –

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian Tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that –

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any provision of this subsection –

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its

Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that –

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over –

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that –

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court –

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in

the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this Act and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures –

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe

and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates –

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.

(Pub.L. 100-497, § 11, Oct. 17, 1988, 102 Stat. 2472.)

§ 2711. Management contracts

(a) Class II gaming activity; information on operators

(1) Subject to the approval of the Chairman, an Indian tribe may enter into a management contract for the operation and management of a class II gaming activity that the Indian tribe may engage in under section 2710(b)(1) of this title, but, before approving such contract, the Chairman shall require and obtain the following information:

> (A) the name, address, and other additional pertinent background information on each person or entity (including individuals comprising such entity) having a direct financial interest in, or management responsibility for, such contract, and, in the case of a corporation, those individuals who serve on the board of directors of such corporation and each of its stockholders who hold (directly or indirectly) 10 percent or more of its issued and outstanding stock;

(B) a description of any previous experience that each person listed pursuant to subparagraph (A) has had with other gaming contracts with Indian tribes or with the gaming industry generally, including specifically the name and address of any licensing or regulatory agency with which such person has had a contract relating to gaming; and

(C) a complete financial statement of each person listed pursuant to subparagraph (A).

(2) Any person listed pursuant to paragraph (1)(A) shall be required to respond to such written or oral questions that the Chairman may propound in accordance with his responsibilities under this section.

(3) For purposes of this chapter, any reference to the management contract described in paragraph (1) shall be considered to include all collateral agreements to such contract that relate to the gaming activity.

(b) Approval

The Chairman may approve any management contract entered into pursuant to this section only if he determines that it provides at least –

(1) for adequate accounting procedures that are maintained, and for verifiable financial reports that are prepared, by or for the tribal governing body on a monthly basis;

(2) for access to the daily operations of the gaming to appropriate tribal officials who shall also have a right to verify the daily gross revenues and income made from any such tribal gaming activity;

(3) for a minimum guaranteed payment to the Indian tribe that has preference over the retirement of development and construction costs;

(4) for an agreed ceiling for the repayment of development and construction costs;

(5) for a contract term not to exceed five years, except that, upon the request of an Indian tribe, the Chairman may authorize a contract term that exceeds five years but does not exceed seven years if the Chairman is satisfied that the capital investment required, and the income projections, for the particular gaming activity require the additional time; and

(6) for grounds and mechanisms for terminating such contract, but actual contract termination shall not require the approval of the Commission.

(c) Fee based on percentage of net revenues

(1) The Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity if the Chairman determines that such percentage fee is reasonable in light of surrounding circumstances. Except as otherwise provided in this subsection, such fee shall not exceed 30 percent of the net revenues.

(2) Upon the request of an Indian tribe, the Chairman may approve a management contract providing for a fee based upon a percentage of the net revenues of a tribal gaming activity that exceeds 30 percent but not 40 percent of the net revenues if the Chairman is satisfied that the capital investment required, and income projections, for such tribal gaming activity require the additional fee requested by the Indian tribe.

(d) Period for approval; extension

By no later than the date that is 180 days after the date on which a management contract is submitted to the

Chairman for approval, the Chairman shall approve or disapprove such contract on its merits. The Chairman may extend the 180-day period by not more than 90 days if the Chairman notifies the Indian tribe in writing of the reason for the extension. The Indian tribe may bring an action in a United States district court to compel action by the Chairman if a contract has not been approved or disapproved within the period required by this subsection.

(e) Disapproval

The Chairman shall not approve any contract if the Chairman determines that –

(1) any person listed pursuant to subsection (a)(1)(A) of this section –

(A) is an elected member of the governing body of the Indian tribe which is the party to the management contract;

(B) has been or subsequently is convicted of any felony or gaming offense;

(C) has knowingly and willfully provided materially important false statements or information to the Commission or the Indian tribe pursuant to this chapter or has refused to respond to questions propounded pursuant to subsection (a)(2) of this section; or

(D) has been determined to be a person whose prior activities, criminal record if any, or reputation, habits, and associations pose a threat to the public interest or to the effective regulation and control of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal practices, methods, and activities in the conduct of

gaming or the carrying on of the business and financial arrangements incidental thereto;

(2) the management contractor has, or has attempted to, unduly interfere or influence for its gain or advantage any decision or process of tribal government relating to the gaming activity;

(3) the management contractor has deliberately or substantially failed to comply with the terms of the management contract or the tribal gaming ordinance or resolution adopted and approved pursuant to this chapter; or

(4) a trustee, exercising the skill and diligence that a trustee is commonly held to, would not approve the contract.

(f) Modification or voiding

The Chairman, after notice and hearing, shall have the authority to require appropriate contract modifications or may void any contract if he subsequently determines that any of the provisions of this section have been violated.

(g) Interest in land

No management contract for the operation and management of a gaming activity regulated by this chapter shall transfer or, in any other manner, convey any interest in land or other real property, unless specific statutory authority exists and unless clearly specified in writing in said contract.

(h) Authority

The authority of the Secretary under section 81 of this title, relating to management contracts regulated pursuant to this chapter, is hereby transferred to the Commission.

(i) Investigation fee

The Commission shall require a potential contractor to pay a fee to cover the cost of the investigation necessary to reach a determination required in subsection (e) of this section.

(Pub.L. 100-497, § 12, Oct. 17, 1988, 102 Stat. 2479.)

§ 2712. Review of existing ordinances and contracts

(a) Notification to submit

As soon as practicable after the organization of the Commission, the Chairman shall notify each Indian tribe or management contractor who, prior to October 17, 1988, adopted an ordinance or resolution authorizing class II gaming or class III gaming or entered into a management contract, that such ordinance, resolution, or contract, including all collateral agreements relating to the gaming activity, must be submitted for his review within 60 days of such notification. Any activity conducted under such ordinance, resolution, contact, or agreement shall be valid under this chapter, or any amendment made by this Act, unless disapproved under this section.

(b) Approval or modification of ordinance or resolution

(1) By no later than the date that is 90 days after the date on which an ordinance or resolution authorizing

class II gaming or class III gaming is submitted to the Chairman pursuant to subsection (a) of this section, the Chairman shall review such ordinance or resolution to determine if it conforms to the requirements of section 2710(b) of this title.

(2) If the Chairman determines that an ordinance or resolution submitted under subsection (a) of this section conforms to the requirements of section 2710(b) of this title, the Chairman shall approve it.

(3) If the Chairman determines that an ordinance or resolution submitted under subsection (a) of this section does not conform to the requirements of section 2710(b) of this title, the Chairman shall provide written notification of necessary modifications to the Indian tribe which shall have not more than 120 days to bring such ordinance or resolution into compliance.

(c) Approval or modification of management contract

(1) Within 180 days after the submission of a management contract, including all collateral agreements, pursuant to subsection (a) of this section, the Chairman shall subject such contract to the requirements and process of section 2711 of this title.

(2) If the Chairman determines that a management contract submitted under subsection (a), of this section, and the management contractor under such contract, meet the requirements of section 2711 of this title, the Chairman shall approve the management contract.

(3) If the Chairman determines that a contract submitted under subsection (a) of this section, or the management contractor under a contract submitted under

subsection (a) of this section, does not meet the requirements of section 2711 of this title, the Chairman shall provide written notification to the parties to such contract of necessary modifications and the parties shall have not more than 120 days to come into compliance. If a management contract has been approved by the Secretary prior to October 17, 1988, the parties shall have not more than 180 days after notification of necessary modifications to come into compliance.

(Pub.L. 100-497, § 13, Oct. 17, 1988, 102 Stat. 2481.)

§ 2713. Civil penalties

(a) Authority; amount; appeal; written complaint

(1) Subject to such regulations as may be prescribed by the Commission, the Chairman shall have authority to levy and collect appropriate civil fines, not to exceed $25,000 per violation, against the tribal operator of an Indian game or a management contractor engaged in gaming for any violation of any provision of this chapter, any regulation prescribed by the Commission pursuant to this chapter, or tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

(2) The Commission shall, by regulation, provide an opportunity for an appeal and hearing before the Commission on fines levied and collected by the Chairman.

(3) Whenever the Commission has reason to believe that the tribal operator of an Indian game or a management contractor is engaged in activities regulated by this chapter, by regulations prescribed under this chapter, or by tribal regulations, ordinances, or resolutions, approved under section 2710 or 2712 of this title, that

may result in the imposition of a fine under subsection (a)(1) of this section, the permanent closure of such game, or the modification or termination of any management contract, the Commission shall provide such tribal operator or management contractor with a written complaint stating the acts or omissions which form the basis for such belief and the action or choice of action being considered by the Commission. The allegation shall be set forth in common and concise language and must specify the statutory or regulatory provisions alleged to have been violated, but may not consist merely of allegations stated in statutory or regulatory language.

(b) Temporary closure; hearing

(1) The Chairman shall have power to order temporary closure of an Indian game for substantial violation of the provisions of this chapter, of regulations prescribed by the Commission pursuant to this chapter, or of tribal regulations, ordinances, or resolutions approved under section 2710 or 2712 of this title.

(2) Not later than thirty days after the issuance by the Chairman of an order of temporary closure, the Indian tribe or management contractor involved shall have a right to a hearing before the Commission to determine whether such order should be made permanent or dissolved. Not later than sixty days following such hearing, the Commission shall, by a vote of not less than two of its members, decide whether to order a permanent closure of the gaming operation.

(c) Appeal from final decision

A decision of the Commission to give final approval of a fine levied by the Chairman or to order a permanent closure pursuant to this section shall be appealable to the appropriate Federal district court pursuant to chapter 7 of Title 5.

(d) Regulatory authority under tribal law

Nothing in this chapter precludes an Indian tribe from exercising regulatory authority provided under tribal law over a gaming establishment within the Indian tribe's jurisdiction if such regulation is not inconsistent with this chapter or with any rules or regulations adopted by the Commission.

(Pub.L. 100-497, § 14, Oct. 17, 1988, 102 Stat. 2482.)

§ 2714. Judicial review

Decisions made by the Commission pursuant to sections 2710, 2711, 2712, and 2713 of this title shall be final agency decisions for purposes of appeal to the appropriate Federal district court pursuant to chapter 7 of Title 5.

(Pub.L. 100-497, § 15, Oct. 17, 1988, 102 Stat. 2483.)

§ 2715. Subpoena and deposition authority

(a) Attendance, testimony, production of papers, etc.

By a vote of not less than two members, the Commission shall have the power to require by subpoena the attendance and testimony of witnesses and the production of all books, papers, and documents relating to any matter under consideration or investigation. Witnesses so

summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States.

(b) Geographical location

The attendance of witnesses and the production of books, papers, and documents, may be required from any place in the United States at any designated place of hearing. The Commission may request the Secretary to request the Attorney General to bring an action to enforce any subpoena under this section.

(c) Refusal of subpoena; court order; contempt

Any court of the United States within the jurisdiction of which an inquiry is carried on may, in case of contumacy or refusal to obey a subpoena for any reason, issue an order requiring such person to appear before the Commission (and produce books, papers, or documents as so ordered) and give evidence concerning the matter in question and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(d) Depositions; notice

A Commissioner may order testimony to be taken by deposition in any proceeding or investigation pending before the Commission at any stage of such proceeding or investigation. Such depositions my [sic] be taken before any person designated by the Commission and having power to administer oaths. Reasonable notice must first be given to the Commission in writing by the party or his attorney proposing to take such deposition, and, in cases in which a Commissioner proposes to take a deposition, reasonable notice must be given. The notice shall state the name of the witness and the time and place of the taking

of his deposition. Any person may be compelled to appear and depose, and to produce books, papers, or documents, in the same manner as witnesses may be compelled to appear and testify and produce like documentary evidence before the Commission, as hereinbefore provided.

(e) Oath or affirmation required

Every person deposing as herein provided shall be cautioned and shall be required to swear (or affirm, if he so requests) to testify to the whole truth, and shall be carefully examined. His testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall, after it has been reduced to writing, be subscribed by the deponent. All depositions shall be promptly filed with the Commission.

(f) Witness fees

Witnesses whose depositions are taken as authorized in this section, and the persons taking the same, shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(Pub.L. 100-497, § 16, Oct. 17, 1988, 102 Stat. 2483.)

§ 2716. Investigative powers

(a) Confidential information

Except as provided in subsection (b) of this section, the Commission shall preserve any and all information received pursuant to this chapter as confidential pursuant to the provisions of paragraphs (4) and (7) of section 552(b) of Title 5.

(b) Provision to law enforcement officials

The Commission shall, when such information indicates a violation of Federal, State, or tribal statutes, ordinances, or resolutions, provide such information to the appropriate law enforcement officials.

(c) Attorney General

The Attorney General shall investigate activities associated with gaming authorized by this chapter which may be a violation of Federal law.

(Pub.L. 100-497, § 17, Oct. 17, 1988, 102 Stat. 2484.)

§ 2717. Commission funding

(a)(1) The Commission shall establish a schedule of fees to be paid to the Commission annually by each class II gaming activity that is regulated by this chapter.

(2)(A) The rate of the fees imposed under the schedule established under paragraph (1) shall be –

(i) no less than 0.5 percent nor more than 2.5 percent of the first $1,500,000, and

(ii) no more than 5 percent of amounts in excess of the first $1,500,000, of the gross revenues from each activity regulated by this chapter.

(B) The total amount of all fees imposed during any fiscal year under the schedule established under paragraph (1) shall not exceed $1,500,000.

(3) The Commission, by a vote of not less than two of its members, shall annually adopt the rate of the fees authorized by this section which shall be payable to the Commission on a quarterly basis.

(4) Failure to pay the fees imposed under the schedule established under paragraph (1) shall, subject to the regulations of the Commission, be grounds for revocation of the approval of the Chairman of any license, ordinance, or resolution required under this chapter for the operation of gaming.

(5) To the extent that revenue derived from fees imposed under the schedule established under paragraph (1) are not expended or committed at the close of any fiscal year, such surplus funds shall be credited to each gaming activity on a pro rata basis against such fees imposed for the succeeding year.

(6) For purposes of this section, gross revenues shall constitute the annual total amount of money wagered, less any amounts paid out as prizes or paid for prizes awarded and less allowance for amortization of capital expenditures for structures.

(b)(1) The Commission, in coordination with the Secretary and in conjunction with the fiscal year of the United States, shall adopt an annual budget for the expenses and operation of the Commission.

(2) The budget of the Commission may include a request for appropriations, as authorized by section 2718 of this title, in an amount equal the amount of funds derived form [sic] assessments authorized by subsection (a) of this section for the fiscal year preceding the fiscal year for which the appropriation request is made.

(3) The request for appropriations pursuant to paragraph (2) shall be subject to the approval of the Secretary

and shall be included as a part of the budget request of the Department of the Interior.

(Pub.L. 100-497, § 18, Oct. 17, 1988, 102 Stat. 2484.)

§ 2717a. Availability of class II gaming activity fees to carry out duties of the Commission

In fiscal year 1990 and thereafter, fees collected pursuant to and as limited by section 2717 of this title shall be available to carry out the duties of the Commission, to remain available until expended.

(Pub.L. 101-121, Title I, Oct. 23, 1989, 103 Stat. 718.)

§ 2718. Authorization of appropriations

(a) Subject to the provisions of section 2717 of this title, there are hereby authorized to be appropriated such sums as may be necessary for the operation of the Commission.

(b) Notwithstanding the provisions of section 2717 of this title, there are hereby authorized to be appropriated not to exceed $2,000,000 to fund the operation of the Commission for each of the fiscal years beginning October 1, 1988, and October 1, 1989. Notwithstanding the provisions of section 2717 of this title, there are authorized to be appropriated such sums as may be necessary to fund the operation of the Commission for each of the fiscal years beginning October 1, 1991, and October 1, 1992.

(Pub.L. 100-497, § 19, Oct. 17, 1988, 102 Stat. 2485; Pub.L. 102-238, § 2(b), December 17, 1991 105 Stat. 1908.)

§ 2719. Gaming on lands acquired after October 17, 1988

(a) Prohibition on lands acquired in trust by Secretary

Except as provided in subsection (b) of this section, gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless –

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and –

(A) such lands are located in Oklahoma and –

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) Exceptions

(1) Subsection (a) of this section will not apply when –

(A) the Secretary, after consultation with the Indian tribe and appropriate State, and local officials,

including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of –

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) of this section shall not apply to –

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86-2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and

the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 465 and 467 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) Authority of Secretary not affected

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) Application of Internal Revenue Code of 1986

(1) The provisions of the Internal Revenue Code of 1986 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such Code) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

(Pub.L. 100-497, § 20, Oct. 17, 1988, 102 Stat. 2485.)

§ 2720. Dissemination of information

Consistent with the requirements of this chapter, sections 1301, 1302, 1303 and 1304 of Title 18 shall not apply to any gaming conducted by an Indian tribe pursuant to this chapter.

(Pub.L. 100-497, § 21, Oct. 17, 1988, 102 Stat. 2486.)

§ 2721. Severability

In the event that any section or provision of this chapter, or amendment, made by this chapter, is held invalid, it is the intent of Congress that the remaining sections or provisions of this chapter, and amendments made by this chapter, shall continue in full force and effect.

(Pub.L. 100-497, § 22, Oct. 17, 1988, 102 Stat. 2486.)

APPENDIX F
UNITED STATES CONSTITUTION

ARTICLE I

. . .

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

. . .

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

ARTICLE III

. . .

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall

be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

ARTICLE IV

. . .

Section. 3. . . .

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.